DOCKET

No. 07-1122

Title:	Arizona, Petitioner v. Lemon Montrea Johnson
Docketed:	February 29, 2008
Lower Ct:	Court of Appeals of Arizona, Division Two
Case Nos.:	(2 CA-CR 2006-0079)
Decision Date:	September 10, 2007
Discretionary Court Decision Date:	November 29, 2007

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 19 2008	Application (07A706) to extend the time to file a petition for a writ of certiorari from February 27, 2008 to March 28, 2008, submitted to Justice Kennedy.
Feb 27 2008	Petition for a writ of certiorari filed. (Response due March 31, 2008)
Feb 28 2008	Application (07A706) granted by Justice Kennedy extending the time to file until March 28, 2008.
Mar 5 2008	Order extending time to file response to petition to and including April 30, 2008.
Apr 25 2008	Waiver of right of respondent Lemon Montrea Johnson to respond filed.
May 6 2008	DISTRIBUTED for Conference of May 22, 2008.
May 13 2008	Response Requested . (Due June 12, 2008)
May 22 2008	Brief of respondent Lemon Montrea Johnson in opposition filed.
May 22 2008	Motion for leave to proceed in forma pauperis filed by respondent.
Jun 3 2008	DISTRIBUTED for Conference of June 19, 2008.
Jun 3 2008	Reply of petitioner Arizona filed. (Distributed)
Jun 23 2008	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jun 23 2008	Petition GRANTED.
Jul 25 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 29, 2008.
Aug 20 2008	Brief amici curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
Aug 29 2008	Joint appendix filed. (Distributed) (Statement of costs filed)
Aug 29 2008	Brief of petitioner Arizona filed.
Sep 5 2008	Brief amicus curiae of United States filed.
Sep 5 2008	Brief amici curiae of Illinois, et al. filed.

Sep 5 2008	Brief amici curiae of National League of Cities, et al. filed.
Sep 5 2008	Letter proposing a lodging of four documents from NYCity Police Dept. and DC Metropolitan Police Dept. referenced in the amicus brief of National League of Cities.
Sep 5 2008	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Sep 8 2008	SET FOR ARGUMENT ON Tuesday, December 9, 2008.
Sep 8 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 23 2008	CIRCULATED.
Sep 26 2008	Extension of time within which to file respondent's brief on the merits to and including October 27, 2008.
Oct 6 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 23 2008	Record received from the Superior Court, Pima County Court Building Arizona. (1 box)
Oct 27 2008	Brief of respondent Lemon Montrea Johnson filed. (Distributed)
Oct 27 2008	Additional record from Superior Court, Pima County Court Building. (exhibits and sealed documents.) (1 envelope)
Nov 3 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Nov 26 2008	Reply of petitioner Arizona filed. (Distributed)
Dec 9 2008	Argued. For petitioner: Joseph L. Parkhurst, Assistant General, Tucson, Ariz.; and Toby J. Heytens, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Andrew J. Pincus, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

84-1

(1)

Supreme Court, U.S.
FILED

No. 071122

FEB 27 2008

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,

Petitioner,

vs.

LEMON MONTREA JOHNSON,

Respondent.

On Petition for Writ of Certiorari to the Arizona Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

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PETITION FOR WRIT OF CERTIORARI

The State of Arizona respectfully petitions for a writ of certiorari to review the Arizona Court of Appeals' September 10, 2007, opinion holding that the pat-down search conducted in this case was not authorized because the seizure of the passenger pursuant to an investigative stop of a car had evolved into a consensual encounter at the time police officer conducted the search.

OPINIONS BELOW

The Arizona Court of Appeals' opinion is reported as *State v. Lemon Montrea Johnson*, 217 Ariz. 58, 170 P.3d 667 (App. 2007). Pet. App. A. The Arizona Supreme Court's order denying review without comment is not reported. Pet. App. B.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals, Division Two, entered its judgment on September 10, 2007. Pet. App. A. The Arizona Supreme Court denied discretionary review on November 29, 2007. Pet. App. B. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In November 2005, a jury in Pima County, Arizona, found Lemon M. Johnson guilty of possession of a weapon by a prohibited possessor and possession of marijuana. The trial court imposed an enhanced but mitigated prison term of eight years on the prohibited possessor conviction and a concurrent prison term of one year on the conviction for possession of marijuana.

A. Suppression Hearing.

Prior to trial, Johnson filed a motion to suppress evidence discovered during a pat-down search of his person. The following facts adduced at the suppression hearing are undisputed. Officer Maria Trevizo of the Oro Valley Arizona Police Department, who arrested Johnson as a prohibited possessor of a firearm, testified that she was a member of the state gang task force. She had attended basic and advanced training in gang enforcement and had two years' on-the-job experience. On April 19, 2002, she was on patrol with two other members of the gang task force in an area of Tucson, Arizona, known for Crips street gang activity. Crips gang members, she testified, were known to possess firearms.

The task force members initiated a traffic stop on a vehicle for an insurance violation. The vehicle had three occupants. While Officer Trevizo approached the vehicle on foot, she noticed Johnson, the back-seat passenger, look back at the police car, say something to the people in the front seat, and then maintain eye contact with the officers.

Trevizo testified that this was unusual behavior because in her experience people normally look front during a traffic stop.

While Detective Machado made contact with the driver, Trevizo made contact with Johnson. The occupants averred that there were no weapons in the vehicle. Johnson had no identification with him. He had a police scanner in his jacket pocket. Trevizo testified: "It caused me concern because most people don't carry around a scanner in their jacket pocket unless they're going to be involved in some kind of criminal activity or going to try to evade the police by listening to the scanner."

Trevizo also noted Johnson's blue shirt, shoes, and bandanna. She said that Crips announce their gang affiliation by wearing blue clothing. She saw particular significance in Johnson's bandanna because bandannas sporting gang colors are an insignia for the gang.

While Johnson was still seated in the back seat, he volunteered that he was from Eloy, Arizona. Trevizo knew from experience in gang interdiction that the predominant street gang in Eloy was the "Trekkle Park Crips." Johnson also told Trevizo that he had done prison time for burglary and had been out about a year.

Trevizo asked Johnson to exit the vehicle. She intended to speak with Johnson away from the other occupants to gather intelligence about his gang. She testified that in her opinion Johnson was free to refuse to exit the vehicle. Once Johnson was out of the vehicle, she asked him to turn around because she was going to pat him down. She said she did this solely for reasons of officer safety "because I

had a lot of information that would lead me to believe he might have a weapon on him." She stated that the search was not based on suspicion of criminal activity but solely on a concern for officer safety. Trevizo patted down Johnson's exterior clothing and felt the butt of a handgun in his pants' waist. Johnson began to struggle a bit, and Trevizo handcuffed him. A subsequent search of his person incident to arrest for weapons misconduct turned up a small amount of marijuana.

Trevizo's contact with Johnson occurred simultaneously with Detective Machado's investigative detention of the driver. The driver was outside the car during the encounter between Trevizo and Johnson.

Trevizo enumerated the circumstances that led her to suspect that Johnson might have a gun: (1) he watched the officers as they approached the vehicle instead of looking front like most traffic stop subjects; (2) he did not have identification; (3) he had a scanner in his pocket; (4) he was wearing blue Crips colors; (5) the traffic stop took place near a known Crips area; and (6) he told her he was a convicted felon. In addition, Johnson told her he was from Eloy, and she knew the Crips were a dominant gang in Eloy. Trevizo said that it was the totality of these circumstances that contributed to her concern for officer safety. The trial court denied the motion to suppress.

B. Arizona Court of Appeals' Opinion.

On direct appeal, Johnson contended that the trial court erred in denying his motion to suppress evidence because Officer Trevizo lacked reasonable suspicion to conduct a protective frisk of his person, and even if

supported by reasonable suspicion in this case, a protective frisk was unconstitutional during a consensual encounter. Two judges of the Arizona Court of Appeals reversed Johnson's convictions and sentences, finding that Johnson was seized pursuant to a lawful traffic stop of the driver, but that Officer Trevizo's encounter with Johnson had "evolved" from an investigative stop to a consensual encounter when Johnson exited the back seat of the vehicle to talk with Officer Trevizo. The majority held that "when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purpose of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger without reasonable cause to believe 'criminal activity may be afoot.'" Pet. App. A at 15, ¶ 29 (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

One judge dissented, concluding that "[v]iewing the evidence under the totality of the circumstances realistically and in a light favorable to upholding the trial court's determination, Trevizo was lawfully in Johnson's presence, the encounter was nonconsensual, and the officer had a reasonable basis to consider him dangerous and therefore conduct a brief pat-down of his person." Pet. App. A at 20, ¶ 39 (citation omitted).

ARGUMENT

In this case, the Arizona Court of Appeals has decided an important question of Fourth Amendment law that has not been, but should be, settled by this Court—whether a pat-down search of a passenger for officer safety, conducted while the passenger is detained as part of a lawful investigative stop, is permissible under the Fourth Amendment. The Arizona court has decided this

important federal question contrary to relevant decisions of this Court. This Court should take review because the opinion substantially inhibits a search for weapons based on officer safety concerns—creating an unworkable, impractical, and dangerous precedent for vehicle stops—and deters officers from acting with appropriate caution when conducting legitimate traffic stops.

I. The State Court Ruled Contrary To This Court's Precedent.

The Arizona Court of Appeals held contrary to this Court's precedent when it determined that a passenger is not detained along with the driver for the full duration of a lawful investigative stop. Pet. App. A at 13–15, ¶¶ 27, 29. Thus the opinion draws the incongruous conclusion that a passenger is not necessarily subject, like the driver, to a pat down search for weapons when the officer reasonably believes the passenger is armed and presently dangerous. Pet. App. A at 13–15, ¶¶ 27, 29.

This Court has held that the driver of a vehicle that is the subject of a traffic stop is seized within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809–10 (1996). Just last term, this Court held that a passenger is seized equally with the driver during an automobile stop. *Brendlin v. California*, 127 S. Ct. 2400, 2410 (2007). An officer may also ask a passenger to exit the vehicle without the need for justification so long as it does not prolong the stop. *Maryland v. Wilson*, 519 U.S. 408, 410 (1997). In *Wilson*, this Court found that the interest in officer safety outweighs the minor intrusion on passengers who are "already stopped by virtue of the stop of the vehicle." *Id.* at 414.

Whenever the circumstances of an on-the-street encounter are such that a police officer reasonably believes he may be dealing with someone who is armed and dangerous, the officer is justified in conducting a pat-down search of that individual for weapons for his own protection and for that of others nearby. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The driver of a car and his passengers can be physically searched pursuant to a stop for traffic violations if an officer has a reasonable suspicion that they might be carrying weapons. *Pennsylvania v. Mimms*, 434 U.S. 106, 111–12, (1977). A pat-down search is reasonable when the officer "has reason to believe that the suspect is armed and dangerous." *Adams v. Williams*, 407 U.S. 143, 146 (1972). "[P]olice may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous." *Michigan v. Long*, 463 U.S. 1032, 1047–48 (1983).

Under the Fourth Amendment, an officer can pat down a driver when the driver is detained if the officer has reasonable suspicion that the driver is armed and dangerous. Also under the Fourth Amendment, a passenger is detained along with the driver during a traffic investigation. Therefore, it stands to reason that an officer does not violate the Fourth Amendment when she pats down a passenger while the driver is detained if the pat down is based on a reasonable suspicion the passenger is armed and dangerous.

Indeed, this Court has stated as much in *Knowles v. Iowa*, 525 U.S. 113, 118 (1998), albeit in *dictum*. In *Knowles*, this Court stated that police officers "may order out of a vehicle both the driver, and any passengers; [and]

perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous."

Depending on the specific circumstances present, some courts have not found weapons searches reasonable. *See United States v. Wilson*, 506 F.3d 488 (6th Cir. 2007); *United States v. McKoy*, 428 F.3d 38 (1st Cir. 2005). But because all circuit courts examine searches under a totality of the circumstances standard, the analyses are highly fact bound. Thus, other federal courts have approved protective pat-down searches of vehicle passengers even in the absence of obvious criminal activity. *See United States v. Rice*, 483 F.3d 1079, 1084 (10th Cir. 2007) (reasonable suspicion existed for pat-down search of vehicle passenger for weapons); *Holeman v. City of New London*, 425 F.3d 184, 192 (2nd Cir. 2005) (under the circumstances, once the passenger was out of the car, the officers were justified in performing a pat down); *United States v. Moorefield*, 111 F.3d 10, 13 (3rd Cir. 1997) (police officers lawfully ordered passenger to remain in the car and put his hands in the air while the traffic stop was being conducted); *United States v. Fryer*, 974 F.2d 813, 819 (7th Cir. 1992) (search of passenger compartment and occupants of vehicle justified by passenger's furtive movements); *United States v. Woodall*, 938 F.2d 834, 837 (8th Cir. 1991) (same); *United States v. Colin*, 928 F.2d 676, 678 (5th Cir. 1991) (police lawfully searched passenger after stopping car for seatbelt infraction).

Even before *Brendlin*, a majority of federal circuit courts had embraced a *per se* rule that the passenger is seized at the moment the driver submits to an official show of authority. *E.g., United States v. Twilley*, 222 F.3d 1092,

1095 (9th Cir. 2000); *United States v. Eylicio-Montoya*, 70 F.3d 1158, 1163–64 (10th Cir. 1995); *United States v. Kimball*, 25 F.3d 1, 5 (1st Cir. 1994); *United States v. Roberson*, 6 F.3d 1088, 1091 (5th Cir. 1993); *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir.1991). Many state courts have held the same. *E.g. State v. Hernandez*, 718 So.2d 833, 836 (Fla. App. 1998); *People v. Bunch*, 796 N.E.2d 1024, 1029 (Ill. 2003); *State v. Eis*, 348 N.W.2d 224, 226 (Iowa 1984); *State v. Carter*, 630 N.E.2d 355, 360 (Ohio 1994); *Josey v. State*, 981 S.W.2d 831, 837–38 (Tex. App. 1998).

Thus, using the standards enunciated by this Court, many lower courts have upheld limited weapon pat downs of passengers where no criminal behavior is suspected but where the police had individualized suspicion that the passenger might be armed and dangerous. These are precisely the facts in the present case. That the Arizona Court of Appeals held contrary to the majority of courts on these facts is attributable partly to the absence of an express holding from this Court that a vehicle passenger, detained along with a lawfully stopped driver, may be patted down when the pat down is based on a reasonable belief that the passenger is armed and potentially dangerous. Opinions like the present one demonstrate that this is an area of Fourth Amendment jurisprudence that is in need of this Court's guidance.

The instant case is a good example. The state court opinion turns on characterizing the encounter between Trevizo and Johnson as consensual. Even though it occurred during an ongoing and lawful investigative detention, the majority reaches the conclusion that Johnson reasonably believed he was free to leave the

encounter. Pet App. A at 10–11, ¶¶ 20–22. The majority reaches this conclusion based solely on Trevizo's subjective beliefs. But the officer's subjective beliefs are not the standard. This Court has clearly held that the inquiry is an objective one, not dependant on the particular officer's subjective beliefs. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Thus, courts employ a reasonable person standard. *See INS v. Delgado*, 466 U.S. 210, 215 (1984) (whether a particular encounter constitutes a consensual encounter or an investigative detention depends on whether a reasonable person under the circumstances would believe he was not free to leave or disregard the official's request for information).

In *Brendlin*, this Court fully explained the reasonable person standard as it applies to passengers in a traffic stop:

> A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on "privacy and personal security" does not normally (and did not here) distinguish between passenger and driver. An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only

> bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.

Brendlin, 127 S. Ct. at 2407 (internal citation omitted). This Court also observed that "[i]t is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety." *Id.*

Using the proper standard, a reasonable person in Johnson's situation would not believe he was free to leave. Three officers approached the vehicle, ordered the occupants to display their hands and the driver to exit the car. An investigation of the driver ensued, and Johnson was seized along with the driver. Moreover, Trevizo wanted to ask him questions about gang and criminal activity. Thus, her questions were inquisitive and potentially inculpatory. A reasonable person would not believe that he could ignore the officers' directives and go about his business. The conclusion of the Arizona court that Johnson's encounter with Officer Trevizo was consensual does not accord with this Court's view of such encounters.

II. The Pat Down Was Reasonable Under The Fourth Amendment.

Because this case involves an investigative stop from start to finish, the only question is what a reasonably prudent police officer would have done under the same circumstances. *Terry*, 392 U.S. at 27. "The touchstone of

the Fourth Amendment is reasonableness." *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 2201 n.4 (2006). Whether a search is reasonable despite the lack of a warrant requires "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

In this case, Officer Trevizo acted with reasonable prudence by patting Johnson down for weapons. Articulable facts known to or observed by her justified her belief that Johnson might be armed and potentially dangerous to the officers. Johnson watched the officers out the rear of the car as they approached the vehicle. This alerted Trevizo because most people involved in a traffic stop look frontward instead of maintaining eye contact with officers who are behind them. Johnson did not have identification. This lent some uncertainty as to his true identity. Johnson carried a police scanner in his jacket pocket. This strongly indicated possible criminal activity because of the ready nature of the device for the purpose of evading law enforcement. Johnson was wearing clothing that was blue, a color affiliated with the Crips. Trevizo knew that Crips were known to carry firearms. Moreover, the traffic stop took place near a known Crips neighborhood, and Johnson said he was from Eloy where the Crips were a dominant gang. Finally, Johnson told her he was a convicted felon.

Taking the facts together, as this Court must, any prudent person would be entitled to proceed with caution believing, as Trevizo believed, that Johnson had connections to a violent street gang known to carry guns.

Therefore, whether or not criminal activity was present, the officer acted within the Fourth Amendment when she patted him down for officer safety.

III. The State Court's Opinion Substantially Inhibits A Search For Weapons Based On Officer Safety Concerns.

This case illustrates the need for this Court to establish a rule of law whereby police officers are permitted to protect themselves when they conduct traffic stops. Officer Trevizo suspected Johnson was armed and potentially dangerous *before* he exited the back seat of the car. The state court of appeals' two-judge majority recommended that under the circumstances presented by these facts "[a]ny person, including a policeman, is at liberty to avoid a person he considers dangerous." Pet. App. A at 7, ¶ 15 (citing *Terry*, 392 U.S. at 32 (Harlan, J., concurring)). This suggests that the recommended course of action for Officer Trevizo would have been to walk away. But requiring Officer Trevizo to walk away from a potentially armed and dangerous passenger would do nothing to address the hazard posed to the public. In this instance, if Officer Trevizo had walked away, even though she reasonably believed Johnson was armed and potentially dangerous, she would have left the two other officers present (who were engaged in processing the driver) in the same danger Trevizo would have avoided. The opinion creates an unworkable, impractical, and dangerous precedent for vehicle stops and deters officers from acting with appropriate caution when conducting legitimate traffic stops.

With this case, this Court can establish that a pat-down search of a passenger for officer safety, conducted while the passenger is detained as part of an investigative stop, is permissible under the Fourth Amendment.

CONCLUSION

For these reasons, the State respectfully requests that this Court accept review of the Arizona court's opinion.

Respectfully submitted

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APPENDIX A

Court of Appeals of Arizona,

Division 2, Department B

The STATE of Arizona, Appellee,

v.

Lemon Montrea JOHNSON, Appellant

No. 2 CA-CR 2006-0079

Sept. 10, 2007.

OPINION

BRAMMER, Judge.

¶1 After a jury trial, appellant Lemon Johnson was convicted of unlawful possession of a weapon as a prohibited possessor and possession of marijuana. After finding he had two prior felony convictions, the trial court sentenced him to concurrent, mitigated and presumptive terms of imprisonment of eight years and one year. Johnson contends the trial court erred in denying his motion to suppress, in giving a reasonable doubt instruction mandated by our supreme court in *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), and in finding he has prior convictions without a jury trial. We reverse.

¶2 When reviewing the denial of a motion to suppress, "we consider only the evidence presented at the suppression hearing and view that evidence and reasonable inferences

therefrom in the light most favorable to upholding the court's ruling." *State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005). Oro Valley Police Officer Maria Trevizo, on assignment with the state gang task force, was on patrol in Tucson with two other officers at approximately 9 p.m. on April 19, 2002. The officers were in an area in which "[d]irectly to the west... is] a neighborhood known as Sugar Hill that is a gang-related area." Trevizo testified Sugar Hill is associated with the Crips gang, and members of that gang wear blue apparel. Trevizo also noted that "gang members will often, in general, possess firearms."

¶3 An officer in Trevizo's vehicle "r[a]n the license plate of a vehicle" and found it had a "mandatory insurance suspension."[1] Trevizo and the other officers in the vehicle "were not investigating gang activity as part of the traffic stop" and were not "targeting [the vehicle] for [their] gang task force function." They also "[did not] know where [the car had] been [and did not] know where it [was] going." The officers had seen no behavior in the vehicle "indicative of criminal activity."

¶4 Johnson was sitting in the rear of the vehicle, with the driver and another passenger in the front seats. Trevizo

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[1] Trevizo stated a mandatory insurance suspension occurs when "the Motor Vehicle[] Department has suspended the registration...for an insurance-related purpose.... Sometimes people will get a ticket for [not having] insurance and not pay it, or sometimes they've been cited multiple times for not having insurance. There's different reasons." According to Trevizo, it "is a ticketable offense" and "[a] civil citation" but does not "bring concern with regard to criminal activity."

stated she had no "reason to believe that [Johnson] was engaged in criminal activity or about to engage in criminal activity when [she] made the traffic stop." Johnson "looked back [at the officers], said something to the people in the front, and then continued to look back at [the officers] while [they] initiated the stop." Trevizo testified this was unusual conduct for an occupant of a vehicle being stopped, and it made her nervous. One officer spoke to the driver and "at some point...asked everybody to put their hands where he [could] see them." He asked whether any of the men in the car had weapons and all the occupants said no. The officer also had the driver exit the vehicle to get "his basic information: driver's license, registration, insurance."

¶5 Trevizo examined Johnson for seven indicia of gang affiliation.[2] Johnson was dressed entirely in blue, and had a blue bandanna. Trevizo testified that bandannas are often used "to show...allegiance or...affiliation with a certain gang" and that the only indicator she saw was Johnson's blue clothing. The driver of the car, however, was wearing red clothing.

¶6 Trevizo said she was "concern[ed]" because Johnson had "a scanner in his jacket pocket," which people normally do not have "unless they're going to be involved

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[2] Trevizo testified the "seven basic...criteria to determine[e] if somebody is a gang member" are: 1) the colors the person is wearing, 2) tattoos, 3) gang signs, 4) self-proclamation of membership, 5) particular jewelry that might be associated with gangs, 6) photographs, and 7) "correspondence between gang members."

in some kind of criminal activity or going to try to evade police by listening to the scanner." It was the first time Trevizo had seen anyone "carry [a scanner] on their person." According to her, "[t]here's nothing illegal about [having a scanner]," but "it's out of the ordinary." Trevizo did not know whether the scanner was turned on or off.

¶7 Trevizo began to talk to Johnson, who was still in the vehicle. He was cooperative and told her his name and date of birth but said he did not have any identification on him. He said he was from Eloy, and Trevizo testified there is a "predominant gang [there] called the Trekkle Park Crips." Trevizo asked Johnson if he had spent any time in prison, and Johnson responded that "he had done time for burglary and had been out for about a year."

¶8 Trevizo testified she "wanted to gather intelligence about the gang [Johnson] might be in" because "gather[ing] intelligence" was one of her "main missions in the task force." She hoped to learn about how big his possible gang was, where it was located, who its leaders were, and "what kind of crimes they're involved in." She sought to isolate him from the other occupants of the vehicle in the hope he would contribute more information. Her "intentions were only to gather gang intelligence and talk to him." The other passenger remained in the vehicle throughout the encounter, talking to the third police officer. According to Trevizo, Johnson "could have refused [to get out of the car], certainly."

¶9 Once Johnson left the vehicle in a normal manner, Trevizo "asked him to turn around," and she "patted him down for officer safety because [she] had a lot of information that would lead [her] to believe he might have

a weapon on him." Trevizo did not tell Johnson she planned to pat him down before he got out of the vehicle but "made the decision" when he exited the vehicle. It was "the totality of what happened that evening that led [her] to pat him down." She had "not observe[d] anything that appeared to be criminal" at the time of the pat-downs search. She stated he could have refused to turn around and put up his hands for the pat-down search. Trevizo felt the butt of a gun near Johnson's waist when she patted him down. Johnson then began to struggle, and she put handcuffs on him.

¶10 Johnson was charged with possession of a weapon by a prohibited possessor, possession of marijuana, and resisting arrest. The trial court denied his motion to suppress the evidence found in Trevizo's pat-down search. A jury found Johnson guilty of the first two charges but not guilty of resisting arrest. This appeal followed.

Discussion

¶11 Johnson asserts the trial court erred when it denied his motion to suppress. "We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo." *State v. Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d 1119, 1140 (2004). (citation omitted).

¶12 Johnson contends the frisk was unconstitutional because his encounter with Trevizo was consensual. Under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed. 2d 889 (1968), an officer may conduct an investigatory stop if the officer has "'a reasonable suspicion supported by

articulable facts'" that criminal activity may be occurring. *In re Ilono H.* 210 Ariz. 473, ¶ 4, 113 P.3d 696, 697 (App. 2005), quoting *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 1584, 104 L.Ed.2d 1 (1989). "Then, if the officer 'has reason to believe that the suspect is armed and dangerous,' the officer may conduct a limited search for weapons." *Id.*, quoting *Adams v. Williams,* 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972). An officer may not, however, conduct a pat-down search during a consensual encounter if the officer lacks reasonable suspicion that criminal activity is occurring, even if the officer has reason to believe a suspect may be armed and dangerous. *Ilono H.*, 210 Ariz. 473, ¶ 11, 113 P.3d at 699.

¶13 In *Ilono H.*, two police officers approached a group of five individuals who were sitting under a ramada in a park that was known for drug and gang activity. 210 Ariz. 473, ¶ 2, 113 P.3d at 6987. Ilono was wearing red, baggy clothing, and an officer testified such clothing is often worn by gang members who frequently carry weapons. *Id.* One officer conducted a pat-down search and found a bottle of beer hidden under Ilono's clothes. *Id.* Ilono was arrested for underage possession of alcohol, and officers later found cocaine in a further search conducted incident to his arrest. *Id.* This court found "[t]he state presented no evidence that would support an officer's reasonable suspicion that any of the individuals under the ramada, including Ilono, was engaged in any criminal activity." *Id.* at ¶ 5.

¶14 However, this finding did not end the inquiry. The state also contended "the officers' actions had not implicated the standards set forth in *Terry* and its progeny because the individuals under the ramada were never detained and were free to leave until the officers developed

cause to arrest Ilono." *Id.* at ¶ 7. This court rejected that argument, finding "[b]oth Arizona jurisprudence and other persuasive authority suggest that an officer's right to conduct a pat-down search should be predicated on the officer's right to initiate an investigatory stop in the first instance." *Id.* at ¶ 12. We stated:

> *Terry* and its Supreme Court progeny addressed the propriety of a pat-down search exclusively in the context of a lawful investigatory stop. We do not read those cases to authorize a pat-down search as part of a mere consensual encounter-even when an officer may have grounds to believe the targets of the encounter are potentially armed and dangerous.

Id. at ¶ 11 (footnote omitted). We also quoted *United States v. Burton*, 228, F.3d 524, 528 (4th Cir. 2000), for the following proposition:

> [A]n officer may encounter citizens and attempt to question them without implicating the Fourth Amendment. But during such police-citizen encounters, an officer is not entitled, without additional justification, to conduct a protective search. To conduct such a protective search, an officer must first have reasonable suspicion supported by articulable facts that criminal activity may be afoot.

210 Ariz. 473, ¶ 12, 113 P.3d at 700 (alteration in *Ilono H.*).

¶15 The decision in *Ilono H.* was based on several different rationales. This court found that, because both the United States and Arizona Supreme Courts have found a person is allowed to disregard or flee from a consensual

encounter with law enforcement officers, it would be inconsistent with this idea if the "officer possesse[d] the authority to require the target of the consensual inquiry to submit to a pat-down search." *Id.* at ¶ 13. Also, we examined Justice Harlan's concurrence in *Terry*, which stated:

> Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection.

Terry, 392 U.S. at 32-33, 88 S.Ct. at 1885-86 (Harlan, J., concurring), *quoted* in *Ilono H.*, 210 Ariz. 473, ¶ 14, 113 P.3d at 700.

¶16 Both parties here discuss whether Johnson had been seized during the stop. Johnson correctly reasons that if he was not seized and the resulting conversation with Trevizo was consensual, she had no right to pat him down. *See Ilono H.*, 210 Ariz. 473, ¶ 4, 113 P.3d at 697. After oral argument was held in this case, the United States Supreme Court determined, although in a factual context different than presented here, that a passenger is seized when the vehicle in which he or she is riding is lawfully stopped by police. *Brendlin v. California*, ---*U.S.*---, 127 S.Ct. 2400,

2410, 168 L.Ed.2d 132 (2007). Therefore, Johnson was seized when the officers stopped the car.

¶17 But, Johnson contends that, even had he been seized when the officers stopped the vehicle, that detention had evolved into a consensual encounter before Trevizo patted him down. Typically, courts have found that seizures during traffic stops can evolve into a consensual encounter when officers return the license or registration to a stopped driver, issue the driver a citation or warning, or tell the driver he or she is free to go. *See United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996) ("A traffic stop may become a consensual encounter if the officer returns the license and registration and asks questions without further constraining the driver by an overbearing show of authority."); *United States v. Werking*, 915 F.2d 1404, 1408-09 (10th Cir. 1990) (same); *State v. Box*, 205 Ariz. 492, ¶ 22, 73 P.3d 623, 630 (App.2003) (traffic stop became consensual encounter after officer issued warning to driver for speeding).

¶18 We have found no case law governing when the seizure of passengers in a vehicle, incident only to a driver's traffic violation, terminates. *See Maryland v. Wilson*, 519 U.S. 408, 415 n. 3, 117 S.Ct. 882, 886 n. 3, 137 L.Ed.2d 41 (1997). (declining to reach this issue). However, common sense suggests that at some point during the encounter the passengers in the vehicle must be free to leave their fate is not entirely tied to that of the police station, innocent passengers will not also be taken into custody or required to accompany the driver. If the passengers are told they are free to leave and do so, it is clear they are no longer seized; it is equally clear that, if they are being questioned about the reason for the stop,

they remain seized. It is less clear when passengers' seizures terminate under factual situations that lie within the extremes of these examples, but we must be guided by reasonableness. *See Ohio v. Robinette*, 519 U.S. 33, 39, 177 S.Ct. 417, 421, 136 L.Ed.2d 347 (1996). ("The 'touchstone of the Fourth Amendment is reasonableness.' Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances."), *quoting Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 (1991).[3]

¶19 "A consensual encounter is the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement officer. If the individual is free to leave at any time during the encounter, he or she is not seized under the Fourth Amendment." *Hernandez*, 93 F.3d at 1498; *see also United States v. Manjarrez*, 348 F.3d 881, 886 (10th Cir. 2003) ("A consensual encounter is a voluntary exchange between the officer and the citizen in which the

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[3] In *Knowles v. Iowa*, 525 U.S. 113, 114, 118, 199 S.Ct. 484, 486, 488, 142 L.Ed.2d 492 (1998), where the Court invalidated a complete search of a vehicle after its driver was given a traffic citation, with no passengers present in the vehicle, the Court stated in passing that police officers "may order out of a vehicle both the driver, and any passengers; [and] perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous." (Citations omitted.) Neither this *dicta*, nor the holding in *Brendlin*, informs us when a passenger seizure ends, or if and when it can become a new, separate, and unrelated encounter, or whether such an encounter may be consensual.

officer may ask non-coercive questions."). An encounter is not consensual, however, if "in light of all the circumstances, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *"State v. Wyman*, 197 Ariz. 10, ¶ 7, 3 P.3d 392, 395 (App. 2000), *quoting Michigan v. Chesternut*, 486 U.S. 567, 569, 108 S.Ct. 1975, 1977, 100 L.Ed.2d 565 (1988). "Whether a person has been seized by police is a mixed question of law and fact." *Id.*

¶20 When we examine whether Trevizo's encounter with Johnson evolved into a consensual encounter, we note that Trevizo's interaction with Johnson and her questions to him were wholly unrelated to the purpose of the traffic stop. Trevizo testified that she and her team "were not investigating gang activity as part of the traffic stop," stating she spoke with Johnson solely because she "wanted to gather intelligence about the gang he might be in," " a choice [she] made to further [the] mission of [her] task force."

¶21 Had Trevizo wanted to order Johnson out of the car after it had been stopped, she could have done so. *See Wilson*, 519 U.S. at 415, 117 S.Ct. at 886 ("[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop."). However, Trevizo did not do so. As we already noted, Trevizo conceded that, as far as she was concerned, Johnson "certainly" "could have refused" her request to get out of the car.

¶22 "[T]he subjective intent of the officers is relevant to an assessment of the Fourth amendment implications of

police conduct only to the extent that that intent has been conveyed to the person confronted." *Chesternut*, 486 U.S. at 576 n.7, 108 S.Ct. at 1981 n.7. None of Trevizo's verbal or nonverbal communications with Johnson before the pat down can reasonably be construed to have conveyed to him that his encounter with her was anything other than consensual. *See Wyman*, 197. Ariz. 10, ¶ 8, 3 P.3d at 395 (finding encounter consensual when "officer did not draw his gun or otherwise physically compel a response...[and] did not demand that appellant...speak with him; instead, he asked, albeit in a loud, forceful manner") (citation omitted). The interaction between them had been cooperative from the time the vehicle was stopped until Johnson got out of the car and Trevizo patted him down, as Johnson answered Trevizo's questions about his identity, where he was from, and his criminal background. This conclusion is consistent with Trevizo's testimony that the traffic stop was routine and that no one in the vehicle had been suspected of criminal activity when she and the other officers made the stop.

¶23 And, most importantly, neither Trevizo nor the other officers ordered all the occupants to get out of the vehicle during the traffic stop for officer safety reasons. Indeed, the front seat passenger remained in the car throughout the encounter. This fact lends further support to the conclusion that Trevizo's questioning of Johnson was wholly unrelated to the stop and constituted a separate, and consensual, encounter.

¶24 Arizona case law supports the proposition that a valid *Terry* stop can evolve into a consensual encounter. In *State v. Navarro*, 201 Ariz. 292, 34 P.3d 971(App. 2001), a suspect in a shooting was detained and placed in handcuffs as part

of a valid *Terry* stop, *id.* at ¶¶ 4, 17, but this court found the encounter became consensual because the defendant had not been "confront[ed] and surround[ed]" at the initial detention, his handcuffs were removed, and he agreed to accompany an officer to the police station to talk about the shooting and traveled with him to do so, unfrisked, in the front seat of the officer's police car. *Id.* at ¶ 17.

¶25 We find the situation and outcome in *Navarro* instructive here, particularly because in *Navarro* arguably more coercive factors were present. Both cases involve valid *Terry* seizures that evolved into consensual encounters between the police and the defendant. Therefore, after examining all facets of the encounter between Trevizo and Johnson, we conclude that Johnson's leaving the car to speak with Trevizo was consensual and part of Trevizo's separate investigation of Johnson's possible gang affiliation, a matter wholly unrelated to the purpose of the traffic stop. A reasonable person in Johnson's position and under these circumstances would have felt he could have remained in the vehicle. *See Wyman*, 197 Ariz. 10, ¶ 7, 3 P3d at 395.

¶26 The stage argues that Trevizo had a specific and articulable suspicion that Johnson was armed and dangerous before she patted him down. It points to Johnson's blue clothing, the police scanner in his pocket, his lack of identification, and his status as a convicted felon. The state also notes Johnson looked backward when the vehicle was stopped, the stop took place near a neighborhood populated by Crips, he was from Eloy where the Crips gang was dominant, and Trevizo knew gang members often carried weapons. Assuming, without deciding, that Trevizo had reasonable suspicion that

Johnson was armed and dangerous, this fact alone does not "authorize a pat-down search as part of a mere consensual encounter." *Ilono H.*, 210 Ariz. 473, ¶11, 113 P.3d at 699; *see* also 4 *Wayne R. LaFave, Search and Seizure* § 9.6 (a), at 617 (4th ed. 2004) ("[I]f an officer, lacking the quantum of suspicion required by *Terry* to make a forcible stop, instead conducts a non-seizure field interrogation, he may not frisk the person interrogated upon suspicion he is armed.") (footnotes omitted).

¶27 We find that Trevizo's initial lawful seizures of Johnson incident to the traffic stop of the driver evolved into a separate, consensual encounter stemming from an unrelated investigation by Trevizo of Johnson's possible gang affiliation and that, under the circumstances of this case, a reasonable person in Johnson's position would have felt free to remain in the vehicle. The state has admitted the officers had no reason to believe Johnson was involved in criminal activity when Trevizo searched him.[4] Trevizo's request that Johnson step out of the car to discuss gang activity, and not for officer safety purposes, was part of a consensual encounter. Accordingly, she had no right to pat

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[4] The question presented by this case is different from the one we answered in *State v. Riley*, 196 Ariz. 40, ¶¶ 14, 16, 992 P.2d 1135, 1140 (App.1999), where we upheld the pat-down search of a passenger during a traffic stop because the officer reasonably suspected criminal activity that permitted him to expand the scope of the investigation beyond the traffic violation and continue the passenger's detention. As we have already noted, the state has admitted the officers had no reason to believe Johnson was involved in criminal activity.

him down for weapons, even if she had reason to suspect he was armed and dangerous. *See Ilono H.*, 210 Ariz. 473, ¶ 11, 113 P.3d at 699. Accordingly, the trial court erred in denying Johnson's motion to suppress the evidence found. *See Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d at 1140.

¶28 In so holding, we agree with many of the observations our dissenting colleague has made. We agree that law enforcement officers, to be entitled to conduct a pat-down search under circumstances suggesting a suspect may be armed and dangerous, need only reasonable cause to believe the suspect may have committed a crime. *See Terry*, 392 U.S. at 30, 88 S.Ct. at 1884; *Ilono H.*, 210 Ariz. 473, ¶ 4, 113 P.3d at 697. We also agree that Johnson was initially detained incident to the officer's stop of the vehicle's driver. *See Brendlin*, ---U.S. at---, 127 S.Ct. at 2410. We do not, however, reach the broader question contained within the facts of this case, whether officers, in the interests of their own safety, and based solely on the seizure resulting from the initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous. *See Knowles v. Iowa*, 525 U.S. 113, 118, 119 S.Ct. 484, 488, 142 L.Ed.2d 492 (1998). (suggesting in unexplained *dicta* that officers may do so). Had the officers immediately ordered Johnson out of the vehicle and conducted a pat-down search for the purpose of assuring their safety during the stop of the driver, that question would be presented.

¶29 Rather, we merely hold that, when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purposes of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger

without reasonable cause to believe "criminal activity may be afoot." *Terry*, 392 U.S. at 30, 88 S.Ct. at 1884. Under such circumstances, the encounter becomes meaningfully indistinguishable from the scenario we addressed and found to be consensual in *Ilono H.*[5]

Disposition

¶30 We reverse Johnson's convictions and sentences and remand the case for further proceedings consistent with this decision. Accordingly, we do not address the other issues Johnson raises on appeal.

CONCURRING: PETER J. ECKERSTROM,
Presiding Judge.

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[5] To the extent we draw some different legal conclusions from the essentially undisputed facts than does our dissenting colleague, we note that it remains the state's burden to demonstrate that those facts provided a legal basis for the pat-down search, not Johnson's burden to show they did not. *See State v. Sauve*, 112 Ariz. 576, 577, 544 P.2d 1091, 1092 (1976) (where officers conduct search under exception to warrant requirement, it is state's burden to show situation qualifies under exception before evidence admissible at trial); *Rodriguez v. Arellano*, 194 Ariz. 211, ¶ 12, 979 P.2d 539, 543 (App. 1999) (same); *see* also Ariz. R. Crim. P. 16.2(b), 16A A.R.S. Presumably the state's theory was that the pat-down search was necessary for officer-safety purposes related to detaining the driver. We simply conclude the underlying facts of the case demonstrate instead that Trevizo conducted the pat-down search as part of a wholly separate consensual encounter based on an investigation unrelated to the purposes of the stop.

ESPOINOSA, Judge, dissenting.

¶31 I respectfully dissent because the majority has interpreted the facts of this case in a less than realistic fashion to essentially conclude that an officer reasonably fearing for her safety during a lawful roadside vehicle stop may not ensure her own safety and that of others present by patting down a suspicious passenger for weapons. Although the majority attempts to disclaim responsibility for such a result by stating it does "not reach" that question, that is precisely the issue raised by the facts of this case. I believe the majority's conclusion is not only contrary to settled law, but could have the unintended effect of the unnecessarily increasing the already high level of risk faced by law enforcement officers during some vehicle stops.

¶32 In *Ilono H.*, 210 Ariz. 473, ¶ 12, 113 P.3d at 700, this court stated "an officer's right to conduct a pat-down search should be predicated on the officer's right to initiate an investigatory stop in the first instance."[6] The majority concedes the stop in this case was lawful. And this court has found the pat-down search of a passenger of a lawfully stopped vehicle constitutional where an officer had a "reasonable concern for his safety." *State v. Riley*, 196 Ariz. 40, ¶ 16, 992 P.2d 1135, 1140 (App.1999) (pat-down search justified after passenger reached for waistband

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[6] In *Ilono H.*, the encounter between the juvenile and law enforcement officers was a consensual encounter, not a traffic stop. 210 Ariz. 473, ¶¶ 2, 11, 113 P.3d at 697, 699.

when asked if had weapon); *see also State v. Valle*, 196 Ariz. 324, ¶ 9, 996 P. 2d at 128, quoting *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972).

¶33 An officer need not have probable cause in order to conduct a *Terry* pat-down search. *Terry*, 392, U.S. at 22, 88 S.Ct. at 1880. If an officer develops a safety concern during a legitimate vehicle stop, further reasonable suspicion of criminal activity is not necessary. *Riley*, 196 Ariz. 40, ¶ 16, 992 P.2d at 1140. Accordingly, a protective search is justified when officers simply possess an articulable reason to fear for their safety. *See Ilono H.*, 210, Ariz. 473, ¶ 10, 113 P.3d at 699. A number of cases lend support to this view. See e.g., *United States v. Kincade*, 379 F.3d 813, 822 (9th Cir. 2004) ("[E]ven outside the context of a lawful arrest supported by probable cause, officers are likewise authorized to conduct a warrantless protective pat-down of individuals they encounter in the field so long as their concerns are justified by reasonable suspicion of possible danger."); *United States v. Hernandez-Rivas*, 348 F.3d 595, 599 (7th Cir. 2003) (protective pat-down search during valid traffic stop is constitutional when officer believes individual may be armed or constitute present threat).

¶34 The majority relies heavily on *Ilono H.*, a case in which officers on foot approached a group of juveniles wearing baggy clothing in colors associated with gangs; the juveniles were simply sitting under a ramada marked with gang graffiti in a park where drug and gang activity were known to occur. 210 Arz. 473, ¶¶ 2, 5, 113 P.3d at 697-98. Under these circumstances, this court found that the officers had no reasonable suspicion of criminal activity by "Ilono, or any other person in the group," to justify

protective searches of the juveniles. *Id.* at ¶ 6. And we held the officers could not, during a consensual encounter, lawfully conduct a protective search based on safety concerns alone. *Id.* at ¶ 11. The trial court here, however, correctly distinguished *Ilono H.* from this case, noting that unlike the random encounter and arbitrary pat-down search in *Ilono H.*, *see id.* at ¶ 2, Trevizo's frisk was preceded by a lawful traffic stop based on founded suspicion. And Trevizo articulated her safety concerns not about the group in general but about Johnson in particular.

¶35 The majority acknowledges that Johnson was lawfully "seized" when the vehicle he was in was stopped, but reasons that "at some point during the encounter the passengers in the vehicle must be free to leave." This is undoubtedly true, but that "point" had not yet occurred here. The record establishes the encounter with Johnson took place within minutes of the stop, and the officer's request that he get out of the vehicle and her patting him down took place within mere moments of each other. As the majority correctly quotes from *Wyman*, an encounter is not consensual if "the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" 197 Ariz. 10, ¶ 7, 3 P.3d at 395, quoting *Chesternut*, 486 U.S. at 569, 108 S.Ct. at 1977. Here, it is highly unrealistic to conclude that merely because the officer was courteous and Johnson cooperative, the ongoing and virtually simultaneous chain of events somehow "evolved into a consensual encounter" in the few short moments involved.

¶36 In fact, Johnson had been physically stopped and temporarily "seized" by the police, through no choice of his

own and against his will, by virtue of the police stop of the vehicle in which he had been riding. *See Brendlin v. California*, ---U.S.---,---, 127 S.Ct. 2400, 2406-07, 168 L.Ed. 132 (2007); *State v. Gomez*, 198 Ariz. 61, ¶ 6, 6 P.3d 765, 766 (App. 2000). After three officers approached the vehicle, all of the occupants were directed to display their hands and the driver to exit the vehicle. Johnson was in no position to "ignore the police presence and go about his business," notwithstanding Trevizo's subjective notion to the contrary upon which the majority relies. *Wyman*, 197 Ariz. 10, ¶ 7, 3 P.3d at 395, *quoting Chesternut*, 486 U.S. at 569, 108 S.Ct. at 1977. While Trevizo was addressing Johnson, her partner, Officer Machado, was investigating the driver of the car. The stop had not terminated and Johnson was still seized as part of the valid traffic stop. *See Gomez*, 198 Ariz. 61, ¶ 6, 6 P.3d at 766; *Riley*, 196 Ariz. 40, ¶ 16, 992 P.2d at 1140. Moreover, although Trevizo stated Johnson could have refused to get out of the car or be patted down, she testified she never told him he did not have to answer her questions or otherwise cooperate with her, and during cross examination did not disagree when counsel asked "in fact, you weren't seeking [Johnson's] permission?"

¶37 Under the circumstances, Johnson's cooperation was not consensual as much as mere "acquiescence [which] signified not voluntary consent, but rather acceptance of an unavoidable course of conduct." *State v. Winegar*, 147 Ariz. 440, 447, 711 P.2d 579, 586 (1985). Moreover, this court has relied on the United States Supreme Court's statement that "'passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made.'" *State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (App. 1991), *quoting Rakas v.*

Illinois, 439 U.S. 128, 155 n.4, 99 S.Ct. 421, 436 n.4, 58 L.Ed.2d 387 (1978) (Powell, J., concurring). Indeed, the Supreme Court has stated police "may order out of a vehicle both the driver, and any passengers; [and] perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous." *Knowles v. Iowa*, 525 U.S. 113, 118, 199 S.Ct.484, 488, 142 L.Ed.2d 492 (1998) (citations omitted).[7] Because Trevizo had the authority to order Johnson from the car, did not inform or indicate to Johnson he was free to disregard her request, and the encounter developed far too quickly for any "evolution" into a consensual one, Johnson's cooperation cannot reasonably be considered consensual.[8]

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[7] The majority discounts this language in *Knowles* as mere dicta, however, it is well established that dicta of the United States Supreme Court carries great weight and is generally authoritative. *See United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000); *In re McDonald*, 205 F.3d 606, 612 (3d Cir. 2000); *see* also *Town Sounds & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 495 n.41 (3d Cir.1992) (Supreme Court dicta should be respected because that court hears relatively few cases and uses dicta to provide guidance to lower courts).

[8] *State v. Navarro*, 201 Ariz. 292, 34 P.3d 971 (App.2001), cited by the majority, bears no resemblance to the situation here. The initial contact with Navarro was not a traffic stop but his arrival at the scene of a shooting during the investigation. *Id.* at ¶ 5. Navarro willingly accompanied officers to the police station to investigate the shooting; during the trip, he was unhandcuffed in the front seat of the patrol car and had only

(Continued)

¶38 Trevizo also testified about multiple circumstances that had led her to believe a pat-down search of Johnson was appropriate, including Johnson's atypical behavior at the initiation of the stop, his possession of the scanner, his admission to being a convicted felon, and his potentially being a gang member. The majority incorrectly states that only one indicator of gang involvement was present. On the contrary, Trevizo, who had received basic and advanced gang training and been assigned to the gang task force for two years when this encounter occurred, testified that she considered several factors, including Johnson's age, the stop of the car occurring on the border of a known Crip neighborhood, Johnson's wearing a blue bandanna, an indicator of Crip affiliation, his being from Eloy, a known Crips area, and his felon status, all indicia of possible gang association. The trial court cited all of these circumstances, as well as Johnson's lack of identification, in determining "there was a reasonable basis to believe there was a danger, and [the] stop allowed them to go ahead and do the pat down."

¶39 Viewing the evidence and totality of the circumstances realistically and in a light favorable to upholding the trial court's determination, *see May*, 210 Ariz. 452, ¶ 4, 112 P.2d at 41, Trevizo was lawfully in Johnson's presence, the encounter was nonconsensual, and

(Continued).

been visually searched for weapons; and at the station he was left unattended. *Id.* at ¶¶ 5-7. Moreover, the events in *Navarro* took place over a lengthy period of time, rather than the first few minutes of an ongoing traffic stop as in this case.

the officer had a reasonable basis to consider him dangerous and therefore conduct a brief pat-down of his person. Accordingly, the trial court did not abuse its discretion in denying Johnson's motion to suppress the evidence discovered as a result of that encounter.

APPENDIX B

SUPREME COURT

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING

1501 WEST WASHINGTON STREET

PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

RACHELLE M. RESNICK KATHLEEN M. KEMPLEY

CLERK OF COURT CHIEF DEPUTY CLERK

NOVEMBER 30, 2007

RE: STATE OF ARIZONA v LEMON MONTREA JOHNSON

Arizona Supreme Court No. CR-07-0290-PR

Court of Appeals Division Two No. 2 CA-CR 06-0079

Pima County Superior Court No. CR20021357

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 29, 2007, in regard to the above-referenced cause:

ORDERED: The State of Arizona's Petition for Review = DENIED

Record returned to the Court of Appeals, Division Two, Tucson, this 30th day of November, 2007.

Rachelle M Resnick, Clerk

TO:

Randall M Howe, Chief Counsel, Arizona Attorney General's Office; Joseph L Parkhurst, Assistant Attorney General, Arizona Attorney General's Office, Tucson Office

Marjorie E Cunningham, Pima County Public Defender's Office

Lemon Montrea Johnson, ADOC 136910, Arizona State Prison, Tucson-Administrative Office

OPPOSITION BRIEF

No. 07-1122

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA

Petitioner,

v.

LEMON MONTREA JOHNSON

Respondent.

On Petition for Writ of Certiorari
to the Arizona Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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May 2008

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RESPONDENT'S BRIEF IN OPPOSITION

The Arizona Court of Appeals followed established Fourth Amendment jurisprudence in determining under the totality of the circumstances that, after a stop for a minor traffic violation, Respondent Lemon Johnson, a passenger in the car, was no longer seized but was engaged in a consensual encounter. Therefore, it held that the pat down was not justified because the officer did not possess a reasonable suspicion of criminal activity. Pet. App. A-15, A-16, ¶ 29. The dissent reached a contrary conclusion simply because it interpreted the facts differently. Pet. App. A-17, A-19, ¶¶ 31, 35. The Court of Appeals specifically declined to reach the broader issue of "whether officers, in the interests of their own safety, and based solely on the seizure resulting from the initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous;" it found that question was not presented because the officers did not immediately order Johnson out of the vehicle and frisk him to assure their safety during the stop of the driver, at a time when Johnson's seizure would have been uncontested. Pet. App. A-15, ¶ 28. However, that is precisely the issue Petitioner has asked this Court to review.

This case instead turns on whether or not Johnson had remained seized when the pat down occurred. Disagreement over this fact-intensive question is not worthy of this Court's review. Indeed, the Arizona Supreme Court declined to take the case. The cases cited by Petitioner to challenge the Court of Appeals' ruling did not address whether the defendant was still subject to seizure and thus do not conflict on the legal issue decided by Arizona's intermediate appellate court. None of the supposedly

conflicting cases cited in the petition involved a situation in which the defendant was no longer seized at the time of the search. There is no conflict in the lower courts for this Court to resolve, and the Arizona decision is not contrary to this Court's precedents.

Moreover, Petitioner's argument wholly depends on the assumption that the traffic stop was still in progress at the time of the frisk, something that was not established at the suppression hearing. Petitioner's question also assumes that the officer possessed a reasonable belief that Johnson was armed and dangerous at the time of the pat down, but the Court of Appeals specifically did not decide this issue. Pet. App. A-13, ¶ 26. Thus, even if the question presented merited review by this Court, which it does not, this case is not the appropriate vehicle to resolve it.

STATEMENT OF THE CASE

Johnson, a young black male, was a back seat passenger in a car stopped on a major thoroughfare by gang task force officers for a civil insurance violation that raised no concerns about possible criminal behavior. Reporter's Transcript (RT) 11-7-05, 6, 10, 25, 32, 44; Record on Appeal (ROA) 12; Pet. App. A-2, ¶¶ 2, 3. The officers stopped the car after running the license plate; they did not target the vehicle because of any known or suspected connection to gang activity, and they had received no reports of a crime nearby. RT 11-7-05 at 28, 32, 39; Pet. App. A-2, ¶ 3.

After Officer Machado made his initial contact, the driver stepped out of the vehicle to talk to him, but the front seat passenger remained in the car. Neither was frisked. RT 11-7-05, 12-13, 30; Pet. App. A-3, A-4, ¶¶ 4, 8. Officer Trevizo then made contact with Johnson, who was still in the back seat. She noticed that he had a police

scanner in his front pocket and found that unusual but not unlawful. She did not recall whether the scanner was turned on or off. RT 11-7-05, 14-16, 3; Pet. App. A-3, A-4, ¶ 6. She noted that "plenty of people . . . like to listen to scanners" for noncriminal purposes, including her own uncle. RT 11-7-05, 15-16. Johnson also wore blue-accented clothing, which she associated with the Crips gang, but the driver of the car wore red. RT 11-7-05, 9, 26; Pet. App. A-2, A-3, ¶¶ 2, 5. Contrary to Petitioner's assertion, Trevizo did not testify that Crips gang members were known to possess firearms. She merely stated vaguely that "gang members will often, in general, possess firearms." RT 11-7-05, 9; Pet. App. A-2, ¶ 2. In response to her questioning, Johnson said he did not have identification with him but provided his name and date of birth. RT 11-7-05, 13, 18, 30; Pet. App. A-4, ¶ 7. When asked, he also said he was from Eloy,[1] had served time for burglary, and had been out of prison for about a year. RT 11-7-05, 18; Pet. App. A-4, ¶ 7.

Trevizo then requested that Johnson step out of the car so that she could ask him some questions. Her sole intention was to gather intelligence for her gang task force work. RT 11-7-05 at 32; Pet. App. A-4, ¶ 8. She wanted to isolate him in the hope that he would be more comfortable contributing gang-related information. RT 11-7-05, 18-19, 32-33; Pet. App. A-4, ¶ 8. She was not compelled to question him by the immediate circumstances but simply wanted to get his insights in order to further the mission of her task force. She did not seek information related to the traffic stop. RT 11-7-05, 18-19, 25; Pet. App. A-4, ¶ 8.

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[1] Eloy is a town approximately halfway between Tucson and Phoenix.

Johnson was cooperative. According to Trevizo, nothing in his behavior indicated his involvement in criminal activity. RT 11-7-05, 28-31; Pet. App. A-5, ¶ 9. She characterized her interaction with Johnson as consensual; as she testified, he "certainly" could have refused to exit the car to answer her questions if he had so desired. RT 11-7-05, 41; Pet. App. A-4, ¶ 8.[2] Contrary to Petitioner's and the dissent's assertion, Trevizo did not recall what was transpiring between Machado and the driver while she conversed with Johnson and he exited the vehicle. RT 11-7-05, 42-43. The record does not reveal whether the driver was still the subject of an investigative detention by the time Johnson got out of the car.

Johnson made no swift or furtive movements and displayed no hostility when he exited. RT 11-7-05, 33; Pet. App. A-4, ¶ 9. Nevertheless, *after* he exited, Trevizo decided to do a protective frisk.[3] RT 11-7-05, 22; Pet. App. A-5, ¶ 9. She directed him to turn around and told him she was going to pat him down for weapons. She did not ask permission to do so. RT 11-7-05, 33-35; Pet. App. A-4, A-5, ¶ 9. Trevizo conceded that she had "not observed anything that appeared to be criminal" at the time of the pat down. RT 11-7-05, 28-31; Pet. App. A-5, ¶ 9. After a brief struggle, she handcuffed Johnson. RT 11-7-05, 23-24; Pet. App. A-5, ¶ 9.

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[2] The dissent claimed the encounter was non-consensual because Trevizo did not disagree when counsel asked "in fact, you weren't seeking [Johnson's] permission?" Pet. App. A-20, ¶ 36. However, the dissent omitted the material part of counsel's question, which asked "in fact, you weren't seeking [Johnson's] permission or authority to search him for weapons?" RT 11-7-05, 35. Counsel's question had nothing to do with whether Johnson had the option to remain in the vehicle and decline to answer more questions. Johnson has never contended that the pat down was consensual, just that his interaction with Trevizo and his exit from the vehicle prior to the pat down were consensual.

[3] Petitioner claims that Trevizo suspected Johnson was armed before he exited the vehicle, but the record does not support this contention.

The trial court denied Johnson's motion to suppress. The Arizona Court of Appeals reversed, finding that the pat down violated the Fourth Amendment because Johnson was no longer seized and, as the State admitted, Pet. App. A-14, ¶ 27, Trevizo did not possess a reasonable suspicion of his involvement in criminal activity.[4] The dissent took issue with the majority on the fact-bound question of whether Johnson remained seized at the time of the frisk. Pet. App A-17, A-19, ¶¶ 31, 35. Although the dissent agreed that a passenger's seizure must end "at some point during the encounter," it contended that "that point had not yet occurred." Pet. App. A-19, ¶ 35. The Arizona Supreme Court denied review.

REASONS FOR DENYING THE WRIT

The Court of Appeals' opinion does not conflict with lower court opinions and follows this Court's established principles protecting the right to be free from unreasonable search and seizure under the Fourth Amendment. Given the fact-intensive circumstances of this case, it was unreasonable for Trevizo to frisk Johnson because, under the totality of the circumstances, he was no longer seized at the time of the search and, as Petitioner has admitted, Trevizo "had no reason to believe [he] was involved in criminal activity." Pet. App. A-14, ¶ 27. As the Court of Appeals found, Petitioner simply did not establish that Trevizo frisked Johnson due to safety concerns related to the traffic stop. Pet. App. A-16, ¶ 29, n. 5. Petitioner claims that the Court of Appeals' opinion addresses whether a pat down of a passenger can be conducted for officer safety "while the passenger is detained as part of a lawful investigative stop,"

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[4] The Court of Appeals did not address Johnson's claims under the Arizona constitution's broader right to privacy and it did not rule on his claim that Trevizo lacked reasonable grounds to believe that he was armed and dangerous.

Pet. 5, but the Court of Appeals specifically held that Johnson was no longer detained when Trevizo conducted the frisk. Contrary to Petitioner's assertion, this Court has never held that a passenger must be detained for the "full duration" of an investigative traffic stop, and such a ruling would be inconsistent with this Court's guiding principle that Fourth Amendment questions must be determined on a case-by-case basis by evaluating the totality of the circumstances. In any event, the record does not even establish that the investigative detention of the driver was ongoing at the time of the pat down. Moreover, the Court of Appeals did not decide that the officer had a reasonable belief that Johnson might be armed and dangerous – the factual predicate of the question presented. In short, there is no basis for further review in this Court.

I. The Court of Appeals Decision Does Not Conflict With This Court's Precedents or Lower Court Decisions.

Petitioner lists several cases evaluating whether a pat down of a driver or passenger is supported by reasonable officer safety concerns. Pet. 8. In all of these cases, the continued seizure of the occupant by virtue of the traffic stop was not in dispute. None of these courts considered whether the encounter with the passenger had become consensual.

Petitioner also cites dicta from this Court's opinions in *Knowles v. Iowa*, 525 U.S. 113, 118 (1998), and *Michigan v. Long*, 463 U.S. 1032, 1047-48 (1983), stating that officers may order persons from an automobile during a traffic stop and conduct a frisk upon reasonable suspicion that they are armed and dangerous, *see* Pet. 7-8, but these cases are inapposite. *Knowles*, which held that a full search of an automobile based on a speeding citation violated the Fourth Amendment, did not even analyze a situation involving a frisk, much less a frisk following a cooperative conversation with a

passenger. In *Long*, which also did not involve a frisk, this Court held that, during a lawful investigatory stop of a driver behaving erratically, a protective search of the vehicle's passenger compartment before allowing the driver to return to the vehicle was reasonable, since the driver could have gained access to a weapon when he re-entered the vehicle. In any event, Trevizo did *not* order Johnson out of the vehicle; she asked him to leave the car, not for officer safety reasons, but to pursue the mission of her task force. Petitioner also misrepresents the holding of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), in which the majority said nothing about the circumstances in which a passenger can be frisked. In *Mimms*, the officer, after observing a traffic violation and stopping a vehicle, immediately ordered the driver out of the car to show his paperwork and frisked him after observing bulge in his pocket. The additional cases cited by Petitioner for the proposition that any person initially detained for a traffic violation can be frisked upon reasonable suspicion of dangerousness likewise did not involve a detention that had become a consensual encounter. *See Adams v. Williams*, 407 U.S. 143, 146 (1972) (officer seized gun based on reliable tip that suspect possessed drugs and a weapon); *Terry v. Ohio*, 392 U.S. 1, 28 (1968) (stop and frisk based on reasonable suspicion of armed robbery).

II. The Court of Appeals Applied This Court's Well-Established Standards to Fact-Specific Circumstances in Reaching its Decision.

Johnson does not dispute that passengers are initially seized by virtue of a traffic stop and can thus challenge its basis. *Brendlin v. California*, 127 S. Ct. 2400 (2007). An officer may order a passenger out of a car "pending completion" of a valid traffic stop, *Maryland v. Wilson*, 519 U.S. 408, 415 (1997), and may then conduct a pat down if justified by reasonable safety concerns related to the stop. *United States v.*

Rice, 483 F.3d 1079 (10th Cir. 2007); *United States v. Hartz*, 458 F.3d 1011, 1018 (9th Cir. 2006).

However, if the traffic stop has concluded, the passenger cannot be lawfully seized unless a reasonable suspicion of criminal activity has arisen. *Terry*, 392 U.S. 1 (seizure must be supported by reasonable suspicion of illegality); *see also Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."). Moreover, a person's seizure by virtue of a traffic stop may evolve into a consensual encounter if the interaction becomes one of "voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement officer," *United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996), even if the person is not explicitly advised that he or she is free to leave. *Ohio v. Robinette*, 519 U.S. 33, 36, 39 (1996) (following detention in a traffic stop, encounter between driver and officer could evolve into consensual encounter even if officer did not explicitly tell driver he was free to go); *United States v. Kimball*, 25 F.3d 1, 8 (1st Cir. 1994) (seizure of passenger ended when officers asked him in nonthreatening and noncoercive manner if he would agree to go to police station and answer questions). Nothing in *Brendlin*, which protects the privacy rights of passengers, casts doubt on the ability of a police officer to end the seizure and commence a consensual encounter once it becomes clear that the passenger is not implicated in the reason for the traffic stop.

Officers may question citizens without implicating Fourth Amendment protections "so long as the officers do not convey a message that compliance with their

requests is required." *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Under such circumstances, a person is authorized to disregard an officer who merely seeks to initiate a consensual encounter. *Id.* at 437; *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). An encounter is not consensual if, in light of all the circumstances, the police conduct would have communicated to a reasonable person that he was not free to leave, *Mendenhall*, 446 U.S. at 554, or to "decline the officers' requests . . . ." *Bostick*, 501 U.S. at 436. Although the inquiry is objective, the subjective intent of the officer about whether an interaction is consensual is relevant "to the extent that that intent has been conveyed to the person confronted." *Brendlin*, 127 S. Ct. at 2409 (citing *Michigan v. Chesternut*, 486 U.S. 567, 575, n. 7 (1988)). Here, contrary to Petitioner's claim, Pet. 10, the Court of Appeals correctly applied the objective test in determining that "[n]one of Trevizo's verbal or nonverbal communications with Johnson before the pat down can reasonably be construed to convey to him that his encounter with her was anything other than consensual." Pet. App. A-12, ¶ 22; A-13, ¶ 25. There is no conflict in the lower courts on this fact-bound question for this Court to resolve.

Contrary to Petitioner's implication, Pet. 7, during a consensual encounter, an officer is not entitled to conduct a protective search unless the officer has a reasonable suspicion, supported by articulable facts, that criminal activity may be afoot. *Terry*, 392 U.S. at 32-33 (Harlan, J., concurring); *United States v. Burton*, 228 F.3d 524, 528 (4th Cir. 2000); *United States v. Gray*, 213 F.3d 998, 1000 (8th Cir. 2000); *In Re Ilono H.*, 113 P.3d 696, 699, ¶ 11 (Ariz. App. 2005); *Gomez v. U.S.*, 597 A.2d 884, 890-91 (D.C. 1991); *People v. Stewart*, 359 N.E.2d 379, 382 (N.Y. 1976); *State v. Giltner*, 537 P.2d 14, 17 (Haw. 1975); *cf. Adams*, 407 U.S. at 146 (officer seized gun based on reliable tip that

suspect possessed drugs and a weapon). Indeed, an individual is free to ignore an officer who lacks reasonable suspicion of illegality. *Bostick*, 501 U.S. at 437; *Mendenhall*, 446 U.S. at 554. In the context of such a consensual encounter, the desire of police officers to protect themselves must yield to the right of citizens who are not reasonably suspected of criminal activity to be free from governmental intrusion. *Terry*, 392 U.S. at 32-33 (Harlan, J., concurring). Here, Petitioner admitted that the officer did not possess reasonable suspicion of criminal activity when she searched Johnson. Pet. App. A-14, ¶ 27.

As this Court has repeatedly emphasized, the "touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Reasonableness must be measured in objective terms by examining the totality of the circumstances. *Robinette*, 519 U.S. at 39 (1996). In applying this test, this Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry" in determining whether a police-citizen encounter is consensual or a seizure. *Id.*; *Bostick*, 501 U.S. at 439 (court must consider all circumstances in deciding whether questioning aboard a bus constitutes a seizure); *Chesternut*, 486 U.S. at 572-73; *Florida v. Royer*, 460 U.S. 491, 506 (1983).

Following these principles, the Court of Appeals evaluated the totality of the circumstances in a specific factual scenario and determined that the frisk of Johnson was unconstitutionally predicated on a consensual encounter, rather than on a stop justified by reasonable suspicion of criminal activity. Though, apparently, the officers stopped the car due to a legitimate registration violation, and Johnson was initially seized as part of that traffic detention, he was not ordered out of the vehicle and his

subsequent exit had nothing to do with the stop. Instead, Trevizo asked Johnson to step out of the car solely because she wanted to gather intelligence for the gang task force and, based on what she had surmised during their cooperative interaction, she believed he might be able to provide useful information. She did not ask him to get out for officer-safety reasons. RT 11-7-05, 18-19, 25, 32; Pet. App. A-4, ¶ 8.

The Court of Appeals' opinion did not turn on whether the investigation of the driver was ongoing when Trevizo frisked Johnson. Nevertheless, contrary to the assertions of Petitioner and the dissent, Petitioner did not establish that the frisk occurred during an ongoing seizure based on the traffic stop. *See* Pet. App. A-19, A-20, ¶¶ 35-36; Pet. 4. Trevizo merely testified that Machado was speaking with the driver outside of the car when she *initiated* her exchange with Johnson while he was still in the vehicle. She did not recall and had not paid attention to what was transpiring between Machado and the driver at the time she frisked Johnson. RT 11-7-05, 12-14, 42-43. Given the routine nature of the traffic stop, it is quite possible that Machado had concluded his investigation of the driver and had already returned his license and registration. If the traffic stop had concluded as to the driver, then Trevizo had no conceivable legitimate basis upon which she could have continued Johnson's detention.

In any event, regardless of whether the driver remained seized, by the time Trevizo asked Johnson if he would get out of the car and answer some questions, Johnson's initial seizure by virtue of the traffic stop had evolved into a consensual encounter. *See Robinette*, 519 U.S. at 36, 39 (traffic detention could evolve into consensual encounter even if officer did not explicitly tell driver he was free to go). By the officer's own admission, nothing in Johnson's behavior suggested his involvement

in criminal activity; indeed, nothing about the circumstances of the traffic stop suggested criminality on the part of anyone in the car in which he was a passenger. RT 11-7-05, 39, 44. Trevizo herself characterized her interaction with Johnson as consensual and said he could have declined her request to exit the car and answer questions. *Id.* at 41; Pet. App. A-4, ¶ 8. She had no plans to detain him. RT 11-7-05, 42. Absent reasonable suspicion of illegality, she certainly had no authority to *require* him to answer questions unrelated to the reasons for traffic stop.

There was also no reason for Johnson to believe that he was required to comply with Trevizo's requests. As the Court of Appeals noted, "[n]one of Trevizo's verbal or nonverbal communications with Johnson before the pat down can reasonably be construed to have conveyed to him that his encounter with her was anything other than consensual." Pet. App. A-12, ¶ 22. In reaching this conclusion, the Court of Appeals reasonably applied this Court's precedents. Indeed, in *United States. v. Drayton*, 536 U.S. 194 (2002), this Court held that police officers did not seize passengers on a bus when, as part of a routine drug and weapons interdiction effort, they boarded the in-transit bus at a rest stop and began asking passengers questions. The circumstances did not reasonably indicate that passengers were required to answer the questions even though the officers did not inform them of the right to refuse to cooperate, one officer was stationed by the door while two officers went to the rear and worked their way forward and, during the exchanges, the officers displayed their badges and stood and looked down at seated passengers. *Id.* at 197-200.

Trevizo agreed that Johnson's interaction with her had been part of a "cooperative situation" and that he had not been "responding to [her] as a police

officer." RT 11-7-05, 45. Coercion would have been inconsistent with her goal of gathering "intelligence" for her gang task force. If she had acted in a coercive manner, she would have been far less likely to develop a rapport with Johnson and obtain useful information. Moreover, Petitioner did *not* establish the length of time that Trevizo engaged in discussion with Johnson. *See id.* at 12-14, 42-43. By her own admission, Trevizo was not caught up in the moment, but had time to make a deliberate decision to pursue "gang intelligence." *Id.* at 18-19, 25.

Petitioner contends that, since Johnson was a passenger in a stopped vehicle, he would not have believed he could ignore Trevizo's request to exit the vehicle and answer questions. But Trevizo's questions had nothing to do with the reason for the stop, which reasonably could have implicated only the driver or owner of the car.[5] Since Johnson was neither, it was reasonable for him to believe that he was not the focus of the investigation and thus did not have to comply with Trevizo's request for cooperation, particularly given her manner and tone.

Petitioner emphasizes this Court's observation in *Brendlin* that passengers in a car stopped by authorities are unlikely to believe that they can leave or disregard an officer's requests as soon as the vehicle stops. Pet. 10. However, Johnson does not contend that he reasonably believed he could decline Trevizo's requests at the inception of the traffic stop, but only after Trevizo had engaged him in a cooperative conversation and conveyed to him that their interaction had become consensual. Petitioner apparently would like this Court to establish a bright-line rule that passengers incidentally seized by virtue of a traffic stop must remain seized until the driver is free

[5] Just after the stop, Trevizo "just stood there while Officer Machado made contact initially with the driver," RT 11-7-05, 12, and Machado presumably announced the reason for the stop.

to go or until an officer verbalizes to a passenger that he or she is free to leave. Such a rule is inconsistent with this Court's unwavering adherence to the "totality of the circumstances" approach.

III. The Court of Appeals' Opinion Is Reasonable.

By her tone and manner, Trevizo conveyed to Johnson that he was not required to get out of the car and engage in a discussion with her. Indeed she testified that she would not have pursued the matter if he had declined her request. RT 11-7-05, 41-42. If he had not voluntarily alighted from the vehicle, he would not have been frisked and would not have been charged and convicted. Effective law enforcement depends upon the cooperation of the citizenry. Petitioner's position would only discourage such cooperation.

It is also significant that, since Crips membership is predominantly black, *see Johnson v. California*, 543 U.S. 499, 527 (2005), Trevizo almost certainly never would have speculated that Johnson was a Crip,[6] and thus never would have wanted to pursue "gang intelligence" from him, if he had not been a young black man present near Sugar Hill, an area with many black residents. Giving the police the broad power urged by Petitioner to frisk passengers in routine traffic stops, regardless of the nature of the interaction, will encourage more pat downs that are either consciously or subconsciously motivated by race or other improper considerations. *See* Office of the Arizona Attorney General, Civil Rights Division and Office of Intergovernmental Affairs, *Report on Racial Profiling* (January 2001); Daniel Gonzalez, "Racial Profiling Must be Stopped, Panel Says," *The Arizona Republic* (March 7, 2008); Paul Davenport,

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[6] She so speculated despite the fact that he wore blue and his companion wore red, a color associated with a rival gang. Pet. App. A-3, ¶ 5.

"Arizona Settles Lawsuit on Racial Profiling," *Arizona Daily Star* (February 2, 2005). The only reasonable interpretation of the Fourth Amendment is to prohibit a pat down in the type of consensual situation at issue here. *See Robinette*, 519 U.S. at 39 (reasonableness is the touchstone of the Fourth Amendment).

IV. The Question Presented Will Not Be Dispositive Because of Unresolved Issues.

The Court of Appeals based its decision on the Fourth Amendment, but Johnson also argued that the pat down violated Arizona's broader right to privacy. Ariz. Const., art. 2, § 8; *State v. Bolt*, 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984) (as a matter of state law, officers may not make a warrantless entry of a home in the absence of exigent circumstances; noting contrary U.S. Supreme Court holding). If this Court were to grant the petition and reverse, the Arizona courts would have to decide this issue.

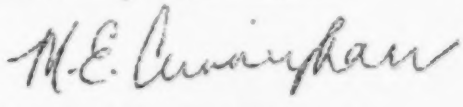
Moreover, the Petition is premised on the claim that Trevizo reasonably suspected Johnson to be armed and dangerous. The Court of Appeals did not decide this issue. Pet. App. A-13, ¶ 26. Trevizo did *not* possess reasonable officer safety concerns, particularly since the stop, which raised no suspicion of criminality, occurred at 9 p.m. on a major thoroughfare with three officers present. RT 11-7-05, 10, 29-30. Johnson was then cooperative, unevasive, made no furtive movements, identified himself, and readily volunteered much of the information used by Trevizo to justify the pat down. If this Court were to grant the petition and reverse, it would be doing so based on a predicate not decided by the Arizona courts. The state tribunals would then have to determine whether the pat down was supported by a reasonable suspicion of dangerousness.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

ROBERT J. HIRSH
Pima County Public Defender



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REPLY BRIEF

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No. 07–1122

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,

Petitioner,

vs.

LEMON MONTREA JOHNSON,

Respondent.

On Petition for Writ of Certiorari to the Arizona Court of Appeals

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

THE PASSENGER IN A VEHICLE DETAINED ALONG WITH A LAWFULLY STOPPED DRIVER MAY BE PATTED DOWN FOR WEAPONS WHEN THE PAT DOWN IS BASED ON A REASONABLE BELIEF THAT THE PASSENGER IS ARMED AND POTENTIALLY DANGEROUS.

This case provides an opportunity for this Court to make clear that a pat-down search of a passenger of a car for officer safety, conducted while the passenger is detained as part of an investigative stop of the car's driver, is permissible under the Fourth Amendment. In this case, no dispute exists that the police lawfully stopped the car in which Johnson was a passenger to investigate a traffic infraction. Officer Trevizo did not suspect Johnson or the other passengers of criminal activity. She patted him down for weapons strictly based on her observations that he may have been armed and dangerous. Thus, this case turns purely on the question of officer safety, whether the police may pat down a vehicle's passenger based on a reasonable belief that the passenger is armed and potentially dangerous.

In his Brief in Opposition, Johnson mistakenly asserts that "the record does not even establish that the investigative detention of the driver was ongoing at the time of the pat down." Brief in Opposition at 6. The Arizona Court of Appeals never intimated that the investigation of the driver had ended. Moreover, contrary to Johnson's contention, the record of the

suppression hearing establishes that Officer Trevizo's contact with and pat down of Johnson occurred during the ongoing detention of the driver. At the hearing on Johnson's motion to suppress the search, the prosecutor asked Trevizo, "did [Detective Machado] ask the driver of the vehicle to step out of the car?" Trevizo answered, "Yes, all of this is kind of happening simultaneously." (R.T. 11/7/05, at 13.) On cross-examination, the Johnson's defense counsel asked Trevizo, "[s]o [Detective] Machado is dealing with the driver, [Officer] Gittings is dealing with the front passenger, you're dealing with my client?" Trevizo said, "Yes, sir." (*Id.* at 30.) Later, the judge asked Trevizo, "[a]t the time that you approached the defendant in this case, what was happening to the driver of the vehicle, to your knowledge?" Trevizo responded, "[t]o my knowledge, Officer Machado was just getting his basic information: driver's license, registration, insurance"; "I did not overhear any conversation between Detective Machado and the driver. They were behind me." (*Id.* at 42–43.) The testimony is clear that the other officers were processing the driver and front-seat passenger at the same time Trevizo spoke with Johnson and patted him down. No evidence suggests that the driver or the vehicle had been released. All the evidence shows that Johnson was seized equally with the driver during the investigative stop and that the investigation of the driver occurred "simultaneously" with Trevizo's conversation with and pat down of Johnson.

The Arizona Court of Appeals concluded that Trevizo's encounter with Johnson had "evolved" from an investigative stop to a consensual encounter when Johnson exited the back seat of the vehicle to talk with Officer Trevizo. Pet. App. A at 14, ¶ 27. But for all the

reasons cited by this Court in *Brendlin v. California*, 127 S. Ct. 2400, 2407 (2007), quoted in the Petition for Writ of Certiorari at 10–11, a reasonable person in Johnson's position would not believe he was free to leave during an investigative stop of the driver, regardless of his or the officer's subjective beliefs about the encounter.

Contrary to Johnson's assertions in his Brief in Opposition at 6–7, the holdings of *Michigan v. Long*, 463 U.S. 1032 (1983), *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), and *Adams v. Williams*, 407 U.S. 143 (1972), support the Petition. In *Mimms*, this Court held that police may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous. 434 U.S. at 110–12. The decision rested in part on the "inordinate risk confronting an officer as he approaches a person seated in an automobile." *Id.* at 110.

In *Adams*, this Court held that the police, acting on an informant's tip, may reach into the passenger compartment of an automobile to remove a gun from a driver's waistband even where the gun was not apparent to police from outside the car and the police knew of its existence only because of the tip. 407 U.S. at 148. Again, the decision rested in part on this Court's view of the danger presented to police officers in traffic stop situations. *Id.*

Long involved the search of a passenger compartment of a vehicle, but its holding is equally applicable to the facts of the present case. This Court held in *Long* that the protection of police and others

can justify protective searches when police have a reasonable belief that the suspect poses a danger because "roadside encounters between police and suspects are especially hazardous." 463 U.S. at 1049. Nothing about the underlying facts in *Mimms*, *Adams*, and *Long* suggests that their holdings do not apply equally to the facts of the present case.

Johnson contends that the Arizona Court of Appeals did not expressly decide whether Officer Trevizo had a reasonable belief that Johnson might be armed and dangerous. Brief in Opposition at 6, 15. However, the state court "assume[d], without deciding, that Trevizo had reasonable suspicion that Johnson was armed and dangerous." Pet. App. A at 13–14, ¶ 26. Indeed, abundant evidence supported Trevizo's suspicion that Johnson was armed and potentially dangerous: (1) he watched the officers as they approached the vehicle instead of looking front like most traffic stop subjects; (2) he did not have identification; (3) he had a scanner in his pocket; (4) he was wearing blue Crips colors; (5) the traffic stop took place near a known Crips area; (6) he told her he was a convicted felon; and (7) she knew from her experience with street gangs that gang members often carry guns. (R.T. 11/7/05, at 20.) In view of the state court's holding that the encounter was consensual, no express finding was required. But the question whether Trevizo reasonably believed Johnson was armed and posed a potential danger is not disputed in the record.

Johnson asserts that he challenged the pat down not just under the Fourth Amendment but also under "Arizona's broader right to privacy." *See* Ariz. Const. art. 2, § 8. Brief in Opposition at 15. He avers that

even if this Court were to grant certiorari and reverse, "the Arizona courts would have to decide this issue." *Id.* Johnson's assertion should not affect this Court's decision to grant certiorari. The mere fact that there is a possible adequate and independent state law ground for the Arizona court's decision does not bar this Court, on petition for a writ of certiorari, from reaching federal questions where the state court has clearly rested its decision on the United States Constitution.[1] *Oregon v. Guzek*, 546 U.S. 517, 523 (2006).

Based on the facts of this case, a pat-down search of a passenger for officer safety, conducted while the passenger is detained as part of an investigative stop, is permissible under the Fourth Amendment. This is consistent with the standards that this Court and many lower courts have enunciated that have upheld

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[1] Moreover, no greater protections for passengers of lawfully stopped cars exist under the Arizona Constitution. *See State v. Reyna*, 205 Ariz. 374, 378, ¶ 14, 71 P.3d 366, 370 (App. 2003) (art. 2, § 8 of the Arizona Constitution is of the same effect and purpose as the Fourth Amendment concerning the scope of allowable vehicle searches). Johnson relies on an inapposite case which holds that the Arizona Constitution affords greater protection against *home searches* than the United States Constitution. *State v. Bolt*, 142 Ariz. 260, 264–65, 689 P.2d 519, 523–24 (Ariz. 1984); *see also State v. Ault*, 150 Ariz. 459, 463, 724 P.2d 545, 549 (1986) (the Arizona Constitution is even more explicit than its federal counterpart in safeguarding Arizona citizens from unlawful entry of their homes by law enforcement officers). *Bolt* and *Ault* expressly concern the sanctity of homes under the state constitution and cannot be applied to the rights of vehicular passengers because of the unique issues that arise during traffic stops. *Reyna*, 205 Ariz. 374, 378 n.5, 71 P.3d 366, 370 n.5; *see Maryland v. Wilson*, 519 U.S. 408, 413 (1997) ("the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger"). *Wilson* is controlling law in automobile stops. Therefore, the Arizona courts have no state constitutional issue left unresolved.

limited weapon pat downs of passengers where no criminal behavior is suspected but where the police had individualized suspicion that the passenger might be armed and dangerous.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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(6)

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, vs. LEMON MONTREA JOHNSON, Defendant.	Case No. CR-20021357 2 CA-CR 2006-0079

Monday, November 7, 2005
Tucson, Arizona

OFFICIAL COURT REPORTER'S TRANSCRIPT

MOTIONS HEARING

BEFORE: THE HONORABLE TED B. BOREK, JUDGE

APPEARANCES:

For the State:

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Deputy County Attorney

For the Defendant:

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THE COURT: State of Arizona vs. Lemon Montrea Johnson. It's CR-20021357.

Appearances.

MS. ARIZPURU: Good afternoon, your Honor, Cynnamon Arizpuru on behalf of the State.

MR. DIODATI: Good afternoon, your Honor. Andrew Diodati on behalf of Lemon Montrea Johnson.

THE COURT: The first thing is the motion, and then we'll see where we go on the trial.

MS. ARIZPURU: Oh, yeah, because there's a new twist on the trial schedule.

THE COURT: Okay. Why – new twist. Do you want to talk about that first?

MR. DIODATI: That would be fine.

MS. ARIZPURU: Are we going to go ahead –

THE COURT: Well, we'll do the motion.

I'll tell you what I'm thinking right now, and if we could possibly start earlier tomorrow if we do a trial, start at 10:00 o'clock, and hopefully get done with the jury tomorrow. We need to do that. And then we'd come back with Mr. Diodati's schedule out there on the 8th. He's – that would get us taken care of tomorrow. And then on the 9th we wouldn't bring the jury back.

[4] MS. ARIZPURU: That's where the State is having the problem. Sergeant Luis Slechta from the Pima County Sheriff's Department is one of my husband's very good friends. My husband was his best man in his wedding. He passed away on Friday, and the funeral is set for 1:30 on – or, I'm sorry, the services are set for 2:30 on Wednesday. Obviously, if the Court says, "No, we're going to trial," then I will be here in trial.

I would, however, respectfully request if possible, if we could do the testimony on Thursday. The State currently – I had already notified all of my witnesses. They were supposed to be only testifying from 1:30

until probably 3:00 o'clock in the afternoon. I have four witnesses and probably Officer Trevizo, who is here today, was going to be the one that took the longest. And her testimony was only expected maybe to be 30 to 45 minutes including cross and redirect.

THE COURT: So you want to go Thursday, but then that risks getting everything done on Thursday.

MS. ARIZPURU: And I understand that.

THE COURT: Okay. Well, let's come back and talk about that. Let's get the witnesses here.

And, Mr. Diodati, I'm sure you talked and [5] see where you want to go. Let's get the testimony.

MR. DIODATI: That will be fine, Judge.

THE COURT: I mean, it may be moot. Who knows. I need to listen to the testimony and – and I'm not – so why don't you go forward.

I read your motions, and you're moving to suppress based on, basically, the lack of proper *Terry* stop.

Call your witness.

MS. ARIZPURU: The State calls Carmen Trevizo.

THE COURT: If you just come on up, be sworn up here first, and then take the stand.

(The witness was sworn.)

OFFICER MARIA CARMEN TREVIZO,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ARIZPURU:

Q. Good afternoon. Would you please introduce yourself?

A. Yes. My name is Officer Maria Carmen Trevizo, and I'm with the Oro Valley Police [6] Department.

THE COURT: You might pull that closer to you, and I don't think it's on. So be comfortable. There you go.

THE WITNESS: Officer Maria Carmen Trevizo with the Oro Valley Police Department.

BY MS. ARIZPURU:

Q. And are you – you're an officer – a sworn law enforcement officer for Oro Valley?

A. Yes, I am.

Q. And back on April 19th, 2002, were you with Oro Valley?

A. Yes, I was, but I was on assignment with the state gang task force.

Q. Okay.

A. So I was a commissioned officer through Oro Valley PD, and they would basically lend me out for a period of three years to the state gang task force.

Q. And so back on April 19th of 2002, you were on loan to the gang task force?

A. That's correct.

Q. What did that involve?

A. My primary function, do you mean?

Q. Yes.

A. My primary function was as a uniformed [7] patrol officer. We didn't necessarily respond to calls, but our main focus at the time was to gather gang intelligence and combat gang crime.

Q. Did you have any special training regarding differentiating individuals who may be involved in gang activity, what gangs they were possibly involved in based upon different characteristics?

A. Yes. I attended both basic and advanced gang training. But the majority of that – the majority of my training came from the three years I worked there, and at the time of this event I had been there for approximately two years already. So certainly the bulk of my training came from just experience.

Q. You're familiar with – well, what is one of the most common ways to be able to tell if an individual belongs to a gang?

A. Well, there's certainly different criteria, but there's seven basic means of criteria to determining if somebody is a gang member. The colors are one thing that we look at. We also look at tattoos. We look at gang signs, self-proclamation. We'll also look at other gang indicia, such as jewelry. We'll look at photographs or correspondence between gang members.

[8] Q. When you say "colors," what are you referring to?

A. Well, typically – and this isn't cut-and-dried, there's a lot of gray area, but typically, certain gangs have certain colors that they're most affiliated with.

Q. Okay. If an individual is wearing all blue or primarily a blue, would that send off some sort of flag in you?

A. To be honest with you, it really depends on the context. It used to be pretty easy to tell back in the '80s and early '90s when somebody was involved in a gang because colors were really good indicia of that.

As time progressed, that became less of an indicator but certainly as a factor. And one of the other things you need to look at when you're looking at colors is typically the age. Most gang members are not over the age of, say, 25 or 30. Age is important. The neighborhood you're in is certainly important and, then, any other gang indicia you might see with that. Colors itself are not necessarily a sole indicator.

But as a gang officer it is one thing you look at, especially bandannas.

Q. Okay. And back on April 19th at [9] approximately 8:56 in the evening, were you on duty?

A. Yes, I was.

Q. Do you remember what area of town you were working in?

A. I believe it was the Grant and Stone area.

Q. And is that area – does that area have any sort of gang affiliation?

A. Directly to the west of that area there's a neighborhood known as Sugar Hill, and that is a gang-related area.

Q. What gang is related to Sugar Hill?

A. Crips. And the color associated with Crips is blue.

Q. Have you had dealings with individuals who are affiliated with the Crip gang?

A. Yes, I have.

Q. And have you ever known a Crip gang member to possess firearms?

A. Certainly gang members will often, in general, possess firearms.

Q. So if you felt that an individual was displaying indicia of a gang affiliation, would you consider that they might possibly be armed?

A. I may consider it, although I might not necessarily pat them down just based on that [10] information alone.

Q. Okay. And at approximately 8:56, were you alone on duty?

A. No. I was traveling in a three-man unit, and I was the rear passenger in the vehicle.

Q. Okay. Who else was in the vehicle with you?

A. At the time, Detectives Machado and Gittings were also in the vehicle.

Q. Were they also assigned to the state gang task force?

A. Yes, they were.

Q. At some point, did – was Officer – Officer Machado was driving?

A. Yes, he was.

Q. At some point, did he run the license plate of a vehicle?

A. I don't recall if it was himself or Detective Machado – or, Detective Gittings, but one of those two officers ran a license plate.

Q. Based upon the information they learned, was it determined that a stop was to be made on that vehicle?

A. Yes. The registration on the vehicle came back "MI suspended," which is mandatory insurance suspension, which is a reasonable suspicion to stop a [11] vehicle.

Q. Okay. Were you able to see the car that was to be stopped?

A. Yes.

Q. Did any of the passengers of that car or even the driver, did any occupant of that car do anything that drew your attention?

A. Yes. When the lights were activated, Mr. Johnson, who I didn't know at the time obviously, was in the rear of the vehicle. And he looked back at us, said something to the people in the front, and then continued to look back at us while we initiated the stop and exited the vehicle. And that, just as an officer, raises the hair on your neck because most people will just keep their eyes in front of them. It's normal to maybe look in the rear view mirror or passenger to look back, but not to keep the eyes on you and watch you until you approach the vehicle.

Q. So – and this – where was Mr. Johnson seated?

A. I believe he was kind of in the middle, but I don't recall specifically. I want to say it was actually in the middle of the seat. My memory –

Q. But it was in the back of the car?

A. Correct. He was in the back seat.

[12] Q. And he continued to watch you and the other officers even as you were approaching the car he was riding in?

A. Correct.

Q. Once you – once the car came to a full stop, what did you do specifically?

A. Well, I exited the patrol vehicle, and I went along the driver's side of the vehicle. And I just stood there while Officer Machado made contact initially with the driver.

Q. Did – were you easily identifiable as law enforcement officers, you and Detective Gittings and Detective Machado?

MR. DIODATI: Your Honor, I'm going to object to the form of the question as "easily identifiable."

THE COURT: Well, just rephrase.

BY MS. ARIZPURU:

Q. What were you wearing that evening?

A. We were wearing police uniform. It was a uniform that the state gang task force wore. It says "Police" on the front of our external vests. It's a black uniform.

Q. Okay. So it's kind of like a tactical uniform?

[13] A. Correct. Yes, there's a tactical vest that you wear on the exterior, and it says "Police" on it.

Q. Does it have any markings on the back?

A. Yes, there's a logo. It says "State Gang Task Force" and "Police" in large letters on the back as well.

Q. And the vehicle that you were driving had the emergency lights on it?

A. Yes.

Q. The red and blue flashers?

A. Correct.

Q. Detective Machado, what did he – did he get the driver of the vehicle to step out of the car?

A. Yes. And all of this is kind of happening simultaneously. He makes contact with the driver, and I think at some point he asked everybody to put their hands where he can see them or put them on the front seat. I don't remember the verbiage exactly, but he has the front passenger exit the vehicle.

Prior to this or maybe shortly thereafter, I made contact with Mr. Johnson and just asked him if he had any identification on him, to which he replied no.

Q. Okay. Now, do you remember hearing Detective Machado ask the – all of the occupants of the vehicle if there were any weapons in the car?

[14] A. Yes. I remember that he asked if there were any weapons in the vehicle, and all occupants said no.

Q. Okay. You keep referring to the individual who was in the back seat of the car as Mr. Johnson.

Do you see him in the courtroom today?

A. Yes. He's sitting right over there in the yellow jumpsuit – or, the orange jumpsuit. I'm sorry.

MS. ARIZPURU: Your Honor, at this time the State would request the record reflect the witness identified the defendant as Mr. Johnson.

THE COURT: So ordered.

MR. DIODATI: No objection.

BY MS. ARIZPURU:

Q. Once Officer Machado had the driver out of the car, you indicated you started to have contact with the defendant; is that correct?

A. That's correct.

Q. Did you notice anything unusual about Mr. Johnson at that time?

A. Yes. What struck me as highly unusual and cause of concern is there was a scanner in his jacket pocket.

Q. Why did that cause you concern?

A. It caused me concern because most people [15] don't carry around a scanner in their jacket pocket unless they're going to be involved in some kind of criminal activity or going to try to evade the police by listening to the scanner.

Q. Is that information that you gathered and knowledge that you have based on your training and experience as a law enforcement officer?

A. Yes, it is, both training and experience. And, quite frankly, I had never really seen anybody carry it on their person except for in this case.

Q. Is it illegal for people to have a scanner in their homes?

A. No, it's not illegal.

Q. Is it illegal for people to have scanners in their vehicles?

A. No, unless there's some conditions of probation or a court order, but not in the A.R.S. books, no.

Q. Just standard, general, there's nothing illegal about it?

A. Correct. There's nothing illegal about it.

Q. Okay. But with your training and experience, that caused you some concern?

A. Certainly, because it's out of the ordinary. And I know there's plenty of people that like to [16] listen to scanners, and I have an uncle who listens to a scanner all the time. He's kind of a police groupie, I guess, so to speak, but he doesn't carry it around in on his person. And I don't know if I could say, he doesn't have the history that I had in this case.

Q. Okay. Well, we'll actually get to that.

When you – prior to having Mr. Johnson step out of the car, did you notice anything else about how he looked?

A. Yes, I did. I also noted that he was all dressed in blue. He had on a blue accent shirt, blue shoes, and a blue bandanna.

Q. And you already talked to us about colors, and you indicated that bandannas are – are something that you specifically note. Why is that?

A. Because gang members will often carry a bandanna for whatever reason, I still don't quite understand, to indicate or to show their allegiance or their affiliation with a certain gang. Certainly bandannas aren't illegal, and most construction workers or people who need to wipe their brow carry around bandannas. But out of that context, I have never seen anybody carrying a bandanna that wasn't using it for

some kind of purpose. It's not something [17] normally done except for in the gang culture. They would carry them just as an insignia of their gang and to represent the color of their gang.

Q. And you had already indicated that you were in a known Crip area. Had you – were you actually in Sugar Hill where the stop was made?

A. The boundaries are not clearly defined. We were on the border of Sugar Hill, I would say. Stone Avenue is about the border of Sugar Hill. It pretty much starts, if you were defining it, to the west.

Q. And do you remember what direction the vehicle was traveling?

A. It was traveling northbound.

Q. Okay. On Stone. Was it – was it – you've already said there isn't really a clear delineation. Was it what you would consider going into Sugar Hill or going out?

A. Neither. It was going along the parallel border of Sugar Hill.

Q. Okay. And you also indicated that Crips wear blue?

A. Yes.

Q. That's their gang color?

A. Yes.

[18] Q. While Mr. Johnson was still in the car, did you have any conversations with him?

A. Yes. I asked him if he had any identification, to which he replied no, which, again, factors into my decision to pat him down.

He had a scanner in his pocket and didn't have ID. And also I think I had asked him, I don't know exactly how I phrased it, where he was from. And he said he was from Eloy, and there is a very well or predominant gang in Eloy called the Trekkle Park Crips.

And at some point I must have asked him if he had done any time in prison or ever been arrested because he provided me with the information that he had done time for burglary and had been out for about a year.

And all of this is, of course, occurring while he's still in the back of the vehicle.

Q. Now, based upon all the information that you had, did you ask Mr. Johnson to get out of the car?

A. I did, but it didn't have anything to do – well, it did have something to do with the information I had at that point. I wanted to gather intelligence about the gang he might be in. That was one of our main missions in the task force, was to try to gather [19] intelligence to help combat that crime. So I wanted to speak with him away from the other occupant that was still remaining inside the vehicle.

Q. Okay. How was it that you were planning on gaining intelligence or going to be attempting to gain intelligence from Mr. Johnson?

A. Well, the kind of intelligence we look for is how big the gang is, what the areas are, maybe what kind of crimes they're involved in. Specifically, we want to maybe know who the leaders are, who is running – who was running the gang. That's all intelligence we would like to have to try to combat the crime those gangs are involved in.

Q. Were you going to pretty much talk to Mr. Johnson?

A. Yes. My intentions were only to gather gang intelligence and talk to him.

Q. Okay. Once you had Mr. Johnson out of the car, what did you do?

A. I patted him down for officer safety because I had a lot of information that would lead me to believe he might have a weapon on him.

Q. And I know that we've talked about a lot of what it's going to be, but what specifically and why did you believe that Mr. Johnson might possibly have a [20] weapon?

A. Based on what I saw, which was, first of all, just starting from the beginning of the stop, him watching us as we approached the vehicle, not having identification on him, having a scanner in his front pocket was huge. I'd have to say that was a huge

contributing factor with my decision to pat him down. I've got the gang colors he was wearing. I've got him close to a gang neighborhood. And he's told me that he has been a convicted felon. I can't say that any one specific thing led me to pat him down. Certainly the scanner was a huge indicator, although not illegal, but something an officer has to consider. And all of those circumstances and facts put together is what led me to pat him down.

I've had plenty of other gang officers or gang members that I've dealt with that maybe just had colors on, and I didn't pat them down just because of their colors. It was really the totality of what happened that evening that led me to pat him down.

Q. And you felt for – that there was an officer safety concern based upon everything that you had observed relating to Mr. Johnson?

A. What I had observed and what he had told me were all factors involved in me wanting to protect [21] myself and the belief that he may have a weapon him.

Q. When you attempted to pat Mr. Johnson down, what happened?

A. I felt the butt of a gun.

Q. Actually, let me back up before we get there.

A. Okay.

Q. Did you let Mr. Johnson know what you were planning on doing –

A. No, I did not. I didn't – I didn't tell him I was planning on patting him down, no.

Q. Okay.

MS. ARIZPURU: If I – if I may, – your Honor, may I approach the witness?

THE COURT: Sure.

BY MS. ARIZPURU:

Q. Officer, I'm handing you what's been marked as State's Exhibit 1. Do you recognize that document?

A. Yes. This is the report that I wrote.

Q. Okay. And that's your report – the report you wrote for this incident?

A. Yes.

Q. And drawing your attention to about halfway down, prior to patting the defendant down, did you inform him of what you were planning on doing?

[22] A. I'm sorry, can you re- –

Q. Well, did you tell him what you were going to do? According to your report there, does it indicate that you told him you were planning on – that you were going to be patting him down?

A. No. I did not ask him prior to exiting the vehicle or I did not tell him I was going to pat him down prior to him exiting the vehicle.

Q. Not prior to exiting the vehicle, but once you made the decision that you were going to pat him down –

A. After he exited the vehicle, I – I guess I made the decision at that point. I can't even tell you if I made it prior to or before or as he exited. But when he exited the vehicle, I asked him to turn around so I could pat him down for weapons.

Q. Okay. Right. And that's – that's what I'm trying to get at. So you did ask him – did you – so you asked him, "Can you turn around so that I can pat you down?" He knew what you were going to be doing?

A. Yes.

Q. And did you ask him to do anything with his arms when you had him do that?

A. I don't recall if I did ask him to put his arms out to the side or not. That I don't recall.

[23] Q. Okay. But did the defendant, without any assistance from you, turn around and place his back to you?

A. Yes. I asked him to turn around so I could pat him down.

Q. Okay. And did he also, without any assistance from you pushing him or pulling on him or anything, raise his arms up for you?

A. Yes. I did not raise his arms for him.

Q. Okay. And while he was standing with his back to you and his arms up, did you start to pat him down?

A. Yes. I patted the waist area of his person.

Q. Okay. And at that point you felt the butt of a handgun, and the defendant began to struggle with you?

A. I felt the butt of a handgun. I pushed it down, and at that point all – all I thought was: He's not supposed to have a gun. This is not good.

So I went to put hands on him so I could detain him. Who knows, maybe later on it would have been fine. I didn't know at that point. All I know – all that's running through my head is: This is not right. He's not supposed to have a gun.

So I pushed it down and went to go hands on [24] and put him into handcuffs.

Q. Okay. So prior to the defendant starting to pull away from you and to struggle, you had not used any force to get him to turn around, to get him to put his hands up, or to get him to comply with the pat down?

MR. DIODATI: I'm going to object. It's asked and answered.

THE COURT: Overruled.

THE WITNESS: No, I did not.

MS. ARIZPURU: Your Honor, I believe that's as far as the defense motion goes. If the defendant – or, if the defense believes it needs to go any further, however, I do believe that is all that is contemplated in the defendant's motion.

THE COURT: Has to do with the pat down.

MR. DIODATI: Yeah, I would concur with that. If the prosecutor feels something arises during cross-examination, she'll have an opportunity to redirect. And we can – if we need to expand it, we'll rely on your discretion. I agree.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. DIODATI:

[25] Q. Thank you, ma'am.

When you felt what you believed to be the butt of a handgun and pushed it down Lemon's pants, your intent then was simply to detain by putting handcuffs on so you could further investigate the situation and maintain the status quo?

A. My intent at that point is just to be safe, and that means putting somebody in handcuffs. So, yeah, at that point I'm just looking to make the situation safe by putting him in handcuffs.

Q. Okay. Let's go back.

When you decided to gather some intelligence in accordance with your gang task force function, you were not legally or constitutionally required to do an interview of him in order to gain that intelligence; right?

A. No.

Q. It was just a choice that you made to try to further of mission of your task force?

A. Correct.

Q. And isn't it true that the car that you were driving in was like a brand new 2003 Cadillac, white in color, unmarked?

A. I don't think it was a Cadillac, but, yes, it is a white, unmarked vehicle.

[26] Q. And emergency lights that we're talking about are not on the roof of the car; they were in the interior, right, of the passenger compartment?

A. Yes. I believe they are in that particular vehicle.

Q. So the profile of this vehicle is not consistent with a regular patrol car, and there is no exterior paint markings or logos on it?

A. The body of the vehicle and the fact it has a spotlight on it is – it is consistent with that of normal police cars. I don't think it was a Cadillac. I believe it was a Chevy Caprice, I believe, what normal police

cars were made at that time. But, no, it did not have external markings on it or light bar on top.

Q. Okay. Now, the driver of this vehicle, later identified as Sir Aimsworth (ph.), last name I can't remember, he was wearing red colors; right?

A. I'm not sure what he was wearing.

Q. If Officer – Detective Machado has indicated in his report and in his interview with me he was wearing red, you wouldn't have any reason to dispute that?

A. No, sir.

Q. And you listed seven factors to determine [27] whether there's indicia of gang members present, and those seven factors are: colors the person's wearing; tattoos; the possibility of their using – throwing gang signs or using gang sign language; four, whether they self-proclaim membership; five, particular jewelry that might be associated with gangs; six is photos of any individuals or the territory they might be in; and seven, correspondence that might be exchanged during various gang members; correct?

A. That's correct.

Q. In this case, the only factors that you saw with Mr. Johnson is the blue clothing; correct?

A. That's correct.

Q. Just in general, based on your training and experience, when do you believe that you have authority to pat down a person for weapons? What do you need to have in order to have that authority?

A. When you have some information that might lead you to believe that they might have a weapon on them.

Q. Okay. Now, you were the one that made the arrest decision in this case and wrote a narrative, about a page, typewritten; right?

A. Yes.

Q. And you also were the officer that testified [28] before the grand jury on this case as well; right?

A. You know, it's been three years. If I testified at grand jury, if you have that, I would say yes. But I don't recall it specifically.

Q. Well, if it comes up, I'll show you. We'll get a copy marked. But you're not going to dispute that for the time being?

A. No, certainly not.

Q. And you and I did an interview on this matter about a week and a half ago; right?

A. Yes, sir.

Q. And during that interview, as well as in your narrative of this case, which is State's Exhibit 1, you have indicated that there was – that this was – that

you were not investigating gang activity as part of the traffic stop here; right?

A. That's correct.

Q. And further, you didn't have any reason to believe that Mr. Johnson was engaged in criminal activity or about to engage in criminal activity when you made the traffic stop?

A. Not at the time of the traffic stop, no.

Q. And in fact, as far as the vehicle that he's in, it's a gray sedan. Do you remember whether it's two-door or four-door?

[29] A. I think you asked me this, and I don't recall if it was two-door or four-door.

Q. In any case, it's traveling northbound on Stone Avenue approaching Grant?

A. That's correct.

Q. Machado is driving, Dave Gittings in the front passenger seat, and you're in the rear of the white passenger car?

A. Yes.

Q. And one of the two decides to run the plate; correct?

A. Yes.

Q. You don't observe any criminal activity in terms of the driving, no reckless driving, no excessive speed, nothing indicative of criminal activity?

A. No, sir.

Q. You get a hit based on the license plate coming back with a mandatory insurance suspension; correct?

A. Yes, sir.

Q. Now, Stone Avenue is one of the major roadways from downtown to north points?

A. Yes, sir.

Q. In this case, it's either a total of four or [30] six lanes across if you consider both directions?

A. Yes, two lanes and probably a turn bay.

Q. Okay. And there's thousands of vehicles that travel northbound on Stone every day?

A. Yes, sir.

Q. And this is shortly before 9 p.m.; right?

A. Yes, sir.

Q. And so when you encounter Mr. Johnson as the rear seat passenger, and at one point you said that – I don't know if you said Machado or Gittings, but you made reference to the front passenger being out of the car, and I wanted to clarify that.

The front right passenger, not the driver, remained in the car during this investigation?

A. Yes, sir. I'm sorry, if I said the front passenger I meant the driver.

Q. So Machado is dealing with the driver, Gittings is dealing with the front passenger, you're dealing with my client?

A. Yes, sir.

Q. And he's cooperative with you in terms of identifying himself, though he doesn't have ID. He said he's Lemon Johnson and gives a date of birth, and it turns out to be correct?

A. Yes, sir. I believe it was correct.

[31] Q. There's nothing inside – in his behavior inside the car that indicates he's involved in criminal activity?

A. Of his behavior, no.

Q. And the focus on the scanner, again, you found it unusual, but you concede that there's nothing unlawful about it; right?

A. No, sir, but it's something I have to consider.

Q. Sure. And you don't know – it doesn't appear – it's not being used at the time; right?

A. I don't recall if it was on or off. If it was on, it could have been at a low volume. That I don't remember.

Q. When you guys activate your emergency lights that are on the kind of inside portion of this Caprice or whatever it is, this white sedan that you're driving, the driver of the car makes a right-hand turn on the side street, Saguaro, which is just south of Grant, and comes to a stop and turns its lights off; right?

A. It's headlights?

Q. Yeah.

A. I don't recall if it turned it's headlights off.

[32] Q. Didn't try to evade you or nothing unusual about the manner in which it responded to the show of authority to have the vehicle stopped; right?

A. Other than what I had already stated with Mr. Johnson watching us, no, nothing out of the ordinary.

Q. Okay. Well, in – and, by the way, this Sugar Hill area is mostly to the west of Stone; right?

A. Yes, to the west.

Q. And this is – this car is just driving north. You don't know where it's been, you don't know where it's going; correct?

A. Right.

Q. This car wasn't something you were targeting for your gang task force function?

A. No. No, sir.

Q. It's occupants you had information on or contact previous to this evening?

A. No, sir.

Q. So your sole reason for directing Mr. Johnson out of the car was to gather – was to gather some gang intelligence information, if any?

A. Yes, sir.

Q. And you wanted, based on previous protocol and experience, to kind of isolate him, get him away [33] for the other two people to see if he might talk to you?

A. Yes, sir.

Q. When you directed him out of the car, he didn't do anything fast or furtive or antagonistic in any way; simply got out of the car?

A. As he exited the car is – once he was out, I asked him to turn around. So, no, in that short period of time of exiting the vehicle to the time I asked him to turn around, no.

Q. All right. And so you had made a decision in your mind at some point, whether he was still in the car, on the way out, or now standing erect outside the car adjacent to the door, that you were going to pat him down for weapons?

A. Yes, sir.

Q. You directed him to turn around so you could accomplish that; right?

A. Yes, sir.

Q. You didn't ask his permission to do that?

A. No, sir. I asked him if – I asked if he would turn around so I could pat him down for weapons. So I guess he could have said no at that point.

Q. In Exhibit 1 – do you have that in front of you?

[34] A. Yes, sir.

Q. Read that clause in there where you talk about having him turn around.

A. He exited the car and I asked him to turn around so I could pat him down for weapons. He turned around and placed him arms out to the side. I patted him around the waist – around his waist and felt the butt of a gun in the front area of his waistband.

Q. Okay. So you're not saying "may I" or "please." You're directing him to turn around and indicating you're going to be patting him down for weapons?

A. I asked him to turn around so I could pat him down for weapons.

Q. Okay. No question you used the phrase or words equivalent "so I can pat you down for weapons"?

A. Yes, sir.

Q. And then you put your hands on him in his waist area and felt what you believed to be the butt of a handgun?

A. Yes, sir.

Q. And in – you tell me if – I guess I'll ask the Court and counsel for the State and the witness, if you'd like to have this marked, I can get it out of my file and mark it. But I'm going to refer to the [35] grand jury transcript in this matter and ask you if you remember telling the grand jury: There were some issues that I wanted to speak to him about away from the other passengers in the other vehicle, so I asked him to exit the vehicle. When he exited, I told him I was going to do a Terry pat down for weapons on him. When I did, I felt a gun in the front waistband of his pants.

Any dispute that's what you said to the grand jury?

A. No, sir. If you have it in a transcript, then, no, sir.

MR. DIODATI: Do you want to see?

MS. ARIZPURU: No.

BY MR. DIODATI:

Q. So this – in fact, you weren't seeking his permission or authority to search him for weapons. This is something you decided to do?

A. I felt for officer safety reasons that at the time I should pat him down for weapons.

Q. At the time that you patted him down for weapons, telling him to turn around so that you could do so, there was nothing that changed in the overall scenario. There was still no belief that you had that he was involved in criminal activity at that time?

[36] A. I did not have probable cause at that point to believe that he was involved in criminal activity; although, I had some indications that that may have been what was going on.

Q. Well, when we interviewed on – last week or a week and a half ago, you indicated you didn't have any suspicion that a crime is in progress or a criminal activity was afoot. Do you remember telling me that?

A. I do not, actually.

MR. DIODATI: If I could, Judge, I'm going to ask to have this item marked, and I just want to play a brief portion. Maybe we can mark the case.

THE COURT: This is a tape recording that you have of a prior hearing or prior interview?

MR. DIODATI: Interview; correct.

THE COURT: What's the date?

MR. DIODATI: I can't remember.

THE COURT: Within the last couple of weeks?

THE WITNESS: I think last week or so.

THE COURT: Okay. And it's – what's the exhibit number?

THE CLERK: A.

THE COURT: Thank you.

(Whereupon, a portion of Exhibit A was [37] played.)

BY MR. DIODATI:

Q. If you'll excuse the rather high-pitched recording of my voice –

MS. ARIZPURU: Andy, could you replay that for me, please?

MR. DIODATI: Sure. I don't have it tabbed. I wanted to it to be transcribed, but it didn't happen.

BY MR. DIODATI:

Q. Now, Officer Trevizo, the long and short of it here is this search or this – and by "search," I don't mean contacting him to –

A. Correct.

Q. – to go into the clothing. But so the Court understands, let's make the record clear, we're talking about a pat down. And you're just using your hands to feel for hard objects that might be inside the clothing. You're not going into pockets, into waistbands, at least initially; right?

A. Yes, sir. That I'm not going into any pockets or into, you know, jacket pockets or anything like that. It it's just a pat down of the exterior clothing.

Q. Okay. But you – you make physical contact [38] with the person when you do this type of search?

A. Yes, sir.

Q. And really, the long ask short of it is, your sole motive here was based on a possible consideration of officer safety because you were going to try to take him away from the other two to gather some intelligence?

A. Yes, sir.

Q. And so there was no crime that you believed was afoot during the time that you first encountered this vehicle to the time you put your hands on him – my client's waist?

A. Well, again, I didn't have probable cause to believe there was a crime, per se. I didn't have that at that point. But certainly there was some evidence that there may be something. Did I know what it was? No, I don't know exactly what it was. Did I have probable cause? No, I didn't have probable cause. But

as a police officer, was that something I had to factor into my consideration, certainly. And did I know specifically what crime? No, I didn't know at that point.

Q. All right. Did you observe anything that you believed to be criminal?

A. Nothing – I did not observe anything that [39] appeared to be criminal, no.

Q. Did you have any reports from collateral sources about a recent crime or a crime in progress?

A. No, I did not.

Q. And when you felt this gun, he had sweat pants on; right?

A. Yes, sir.

Q. So it's not like a belt, where it's tight. Your thought was: I'm going to push this down his waist?

A. That was my reaction. I can't tell you what I was thinking.

Q. And your next thought was you've got to get him in handcuffs; right? So you put your handcuffs on him now with the intent of putting his hands behind him to handcuff him?

A. Yes, to make sure he can't get to that gun.

Q. And did you not tell him when you put your hands on him and attempted to get him in handcuffs that he was under arrest for anything in particular?

A. No, sir. I don't believe I did.

MR. DIODATI: That's all I have, Judge.

THE COURT: Redirect.

MS. ARIZPURU: Thank you, your Honor.

REDIRECT EXAMINATION

BY MS. ARIZPURU:

Q. And at the time that you were trying to put handcuffs on the defendant, was he under arrest?

A. At that point, you know, he – I can't say that he was because all I was concerned about at that point was making the situation safe. I guess technically, if you were to say it's inevitable discovery, yeah, I guess he was. But at that point I wasn't even thinking arrest. I was just thinking: Get the situation safe so he can't get to the gun. That's all.

Q. The defense played the tape for you, and in that the question that he asked was did you have any suspicion – the exact wording I don't have, but it was somewhere along the line of anything pointing to a particular crime that was being committed, and your response was no?

A. Correct. I can't say what particular crime would have been committed. I don't know. I didn't have anything more than a scanner at that point, and that can be used to evade police for any kind of crime that you might be committing. What specifically, I

don't know. Is it an indicator that it's being used [41] to evade the police because you're involved in a crime? Yes.

Q. Could the defendant have refused to get out of the car when you asked him to?

A. Yes.

MR. DIODATI: I'm going to object, your Honor. It goes beyond the scope of cross-examination and also not relevant.

THE COURT: I'll overrule. It's her view. Go ahead.

BY MS. ARIZPURU:

Q. So you responded that yes, the defendant could have refused to get out of the car?

A. He could have refused, certainly.

Q. Could he have refused to turn around for the pat down?

A. Yes, he could have.

Q. Could he have refused to put his hands up for the pat down?

A. I don't know that I directed him to do that, but if I did, yeah, he could have.

Q. Did he ever refuse until he started struggling?

A. No, ma'am.

Q. At the time that you asked the defendant to [42] step out of the car, were you planning on handcuffing him?

A. No, ma'am.

Q. You were just planning on talking to him?

A. Yes, ma'am.

Q. Just to gain intelligence?

A. Yes.

Q. You weren't going to be placing him under any sort of constraints or detaining him in any way?

A. No, ma'am.

Q. And the purpose for your – for that pat down was entirely based upon officer safety from what you had observed surrounding and involving Mr. Johnson?

A. Yes.

MS. ARIZPURU: Nothing further, your Honor.

THE COURT: I have several questions.

THE WITNESS: Yes, sir.

THE COURT: At the time that you approached the defendant in this case, what was happening to the driver of the vehicle, to your knowledge?

THE WITNESS: To my knowledge, Officer Machado was just getting his basic information: driver's license, registration, insurance.

I don't recall or don't have any information [43] about what conversation was going on at that point between the two of them.

THE COURT: Did you ever hear any conversation between Machado and the – the driver or Gittings and the passenger?

THE WITNESS: I did not overhear any conversation between Detective Machado and the driver. They were behind me. And at that point I was just speaking with Mr. Johnson and not really paying attention or listening to what their conversation was.

THE COURT: This – if I'm not mistaken, I think you said you ran the tag, and the tag indicated – help me with this. The tag indicated that the vehicle was uninsured?

THE WITNESS: Mandatory insurance suspension.

THE COURT: Uh-huh.

THE WITNESS: Which basically means that the Motor Vehicle's Department has suspended the registration on that vehicle for an insurance-related purpose, and there's different reasons why they put that suspension on a registration. Sometimes people will get a ticket for insurance and not pay it, or sometimes they've been cited multiple times

for not having insurance. There's different reasons. I don't [44] know all of them, but it's a suspension of the registration.

THE COURT: Do you have any idea whose registration was suspended at that time? I know it was the vehicle, but, you know, who was registered to the car?

THE WITNESS: No, I don't recall, your Honor. I don't recall who the registered owner was.

THE COURT: Did the fact that you have an unregistered vehicle being driven bring concern with regard to criminal activity?

THE WITNESS: No, your Honor, it doesn't.

THE COURT: But it is a ticketable offense?

THE WITNESS: Yes, your Honor, it is.

THE COURT: So –

THE WITNESS: A civil citation.

THE COURT: A civil citation.

And so upon determining that's the only circumstance involved, then you would, you know, ticket the person?

THE WITNESS: For all intents and purposes, yes, with nothing else going on. You might take their license plate if they don't have current proof of insurance along on that stop, but that would be the [45] extent of your contact if everything else is okay.

THE COURT: What was the defendant's tone and what have you in talking to you when you were asking him questions and what have you as you went back? You asked him his name and was it a cooperative situation, or was he responding to you as a police officer?

THE WITNESS: Yes, he was cooperative with me.

THE COURT: Did you ever tell him anything about he didn't have to answer any of your questions or anything of that kind of advice to him?

THE WITNESS: No, sir, because it was not an in-custody situation.

THE COURT: Sure.

Follow-up?

MR. DIODATI: I don't believe I have.

THE COURT: State.

MS. ARIZPURU: No, your Honor.

THE COURT: Okay. Thanks very much. You're excused. You can have a seat.

MR. DIODATI: Your Honor, if I could, would we be able to take a two-minute recess so I can call City Court and let them know I'm going to be late.

THE COURT: Why don't I take one, too.

[46] Do you have your phone or – you can use this.

MR. DIODATI: Terrific. I just want to be courteous to them.

(A recess was taken.)

THE COURT: We're here back on the record with the defendant and counsel.

Ready to argue or any more evidence?

MS. ARIZPURU: That's it for the State's evidence, your Honor.

THE COURT: Okay.

MR. DIODATI: We don't have any evidence to present, Judge.

THE COURT: Okay. You can argue.

I'll just tell you, this is really close in my view, so I'll just tell you that. And that is the *Terry* stop aspect seems to be legitimate at that point, and so – but I'm real interested in how you connect. It's almost kind of philosophically you've got a stop for one totally different purpose, and it's almost like – and that itself justifies what would happen. Or are you into a second *Terry* stop situation where you have an encounter? So it's interesting from that standpoint, too.

So I'm happy to hear your argument.

[47] MS. ARIZPURU: Well, your Honor, I think in this case you have to look at everything that

Officer Trevizo had in front of her at the time that she made the decision to do a pat down of the defendant. She has an individual who is, for the moment of initial encounter, has been acting in a manner that, based on her training and experience is unusual. He continues to monitor the officers during the stop as they approach the vehicle. She testified that that's unusual in her view as to how individuals normally react to a traffic stop.

She is very near to a known gang area, Sugar Hill, which happens to be a Crip neighborhood, with the blue colors as their affiliated color. She is an officer who has training and extensive experience in the gang field after having worked exclusively in the gang task force for almost two years once this – this incident occurred.

She gets up to the car and starts talking to the defendant. Now, the defense brought up the only thing she really had – of, basically, that seven-part checklist that she goes for, the only thing she really had the was the colors that he was wearing. Well, at that time he's still in the back seat of a car. She hasn't gotten him out, so there's no way at that time [48] that she necessarily could have seen any of the other indicators.

And a lot of them have to do with things that – you know, and unfortunately I didn't ask her while she was up there, but it's not logical to think that as the police officer is standing there, that they're going to be throwing gang signs at her. She's obviously not

a gain [sic] member. She's not somebody that they need to threaten off or show their allegiance to. So there's nothing – the pictures, if they are there, are going to be in the car or on the individual. They're not going to be holding them up in front of him: Look, here's a picture of me with all of my gang friends. That's not going to be something that's going to happen either, while he's sitting in the car.

So initially the color and the fact that there was a bandanna, which, based on her training and experience that she has dealing with gang members, is something that is very important. That bandanna had great significance to her.

What also had great significance to her was the scanner. And Officer Trevizo testified that the scanner was extremely important, especially once the defendant informed her that he had just been released from – or that he had been – he had served time for [49] burglary. That's something that drew her attention. She has an individual who has served time, and he's got a scanner.

It's not a scanner that is sitting on the dashboard of the car, so presumably to monitor accidents or anything. It's not in somebody's house so that people who are into Crips and cops can sit there, when the show's not on, and they can monitor, you know, their own local hometown cops. This is a scanner that is stuffed in somebody's pocket as they're sitting in the back seat of a car. This is something, in her training and experience, is huge. She testified in her training

and experience the reason somebody is going to have a scanner on their person like that is so they can monitor to make sure that the cops aren't responding to them if they're in the midst of committing criminal acts.

He also indicated that he was – he was from Eloy, which she knows also has a – a predominate Crip gang in it; again, drawing significance to the blue clothing of the defendant and the blue bandanna that he had. At that point, she wants to talk to him. She wants to talk to him so that she can get information from him if he's willing to talk to her, and it appears he is willing because she asks him if he could [50] get out of the car and he does.

And the defense isn't arguing that there's anything wrong with her asking him to get out of the car. However, for her own safety, for the safety of the other officers, as well as the safety of anybody else who is around, she testified she knows that gang members oftentimes carry weapons. She had enough reason to believe that he may have gang ties. The neighborhood that he was in, the colors that he was wearing, where he was from, the bandanna that he had, and then not even going on the gang side but going on the possibility that a crime might – there might be something criminal going on with the scanner in his pocket, she makes the determination that, based on her training and experience, being a law enforcement officer having to deal with situations and individuals that are dangerous to her safety as well as the safety of her partners and the safety of the

community, she makes the decision that based upon everything that she has in front of her, that she is going to do a pat-down search. Not an extensive search. Do you have any weapons? The individuals in the car had all been asked if there were any weapons, and all had given a negative response.

Once Mr. Johnson is out of the car and is [51] away from them and dealing one-on-one with Officer Trevizo, she has a stake in this. It is her safety that is in jeopardy should she [sic] be armed. Based upon what she has in front of her, she makes the determination that she feels an officer safety pat down is necessary. She has an individual in a gang neighborhood, wearing gang colors, carrying a bandanna, with a scanner in his pocket, who's been acting suspiciously since the initial – the initial emergency equipment on the patrol car was activated. She feels that something is going on and that she needs to pat the individual down.

She asks him: Turn around so I can do a pat down on you. He doesn't say, "No, I want to get back in the car. I don't want to do this anymore." He doesn't say, "If you want to talk to me, talk to me. You're not touching me." He voluntarily turns his back to her and he raises his arms. Whether in response to, "Can you put your arms up for me also?", or just because she said, "I'm going to do a pat down," he voluntarily turns around for her. She does not use any force. She does not turn him around physically. She didn't put his arms up. She doesn't hold him in place. She doesn't handcuff him. She in no sway [sic]

restricts his liberty or anything. It's an [52] officer safety pat down.

It isn't until she feels the butt of the gun in his waistband that it escalates from an officer safety pat down to something more. But at the initial time, all that was intended is just a simple officer safety pat down that he consented to in his actions. She never asked, "Do you consent to me patting you down?" The State concedes that that was never asked. However, in her statement or her question, however you want to go ahead and view it, of, "Turn around so I can pat you down," or, "Will you turn around?", "Can you turn around?", "Please turn around," he voluntarily did so. He consented to the pat down. He knew why she asked him to turn around, and he did so. His actions were a consent to that pat down.

There was never an indication from Officer Trevizo that she was going to place him under arrest, that she was going to detain him or handcuff him if he wouldn't do so. And he never even asked, "Do I have to?" He consented when he turned around. That consent overrides anything else if the Court does find that this went beyond the scope of a *Terry* stop, which the State does not concede.

Again, the State's position is that there was sufficient information to justify an officer [53] safety pat down of the defendant, and that's what this was limited to. And the defendant consented to such a pat down when he voluntarily turned around after being

informed of why the officer wanted him to turn around and put his hands up.

So based upon all that, the State respectfully requests that you deny the defense's motion.

THE COURT: Thank you.

MR. DIODATI: Thank you, your Honor.

There's not consent here. This context is clearly not indicative of consent. In fact, when this officer testified to the grand jury in April, just a few days after this incident on the 26th day of April, 2002, about a week after this incident, she conceded when I read it to her: When he exited, I told him I was going to do a *Terry* pat down for weapons on him, which I did. She's testified and her report says she tells him to turn around so she could pat him down for weapons. This is not a consensual encounter. I mean, the State wants to shift the burden here.

And ironically, the resisting arrest case argue that the defendant has to show some sort of resistance or lack of something, and the officer then has to put her hands on him to get him in a position [54] to do a *Terry* pat down to make it something other than a nonconsensual, and that's balderdash. We want our citizens to comply with officers. If this were a consent, there would have been a "may I" language or "can I." She had "like to." She made the decision what she was going to do, and she did it. She told him, "Turn around so I can pat you down for weapons," and she began to do just that. The moment she put her hands

on this person we've got a problem constitutionally because it has to be justified.

And what the State doesn't get here, Judge, and I know you can glean from my motion or you can glean from your experience in handling cases of this nature, is there are two prongs to this thing. We have to have, before there is a belief that a person might be armed and dangerous, there has to be reasonable suspicion that criminal activity is afoot. And in this case we have, for all intents and purposes, a very routine traffic stop with a car that's randomly checked, comes back with a suspended registration purely civil in nature, no aggravated driving, no aggravated behavior, make a right turn and pulls off on a side street, and three officers get out and encounter three individuals in this automobile.

The front passenger stays in the car. The [55] driver gets out, and Officer Trevizo directs Mr. Johnson out. Now, if this were just an issue of was there reasonable suspicion that Lemon Johnson was involved in a gang, then the State would carry the day. But that's not what they need to show. They need to show reasonable suspicion that criminal activity is afoot because being in a gang is not illegal. It's what you do once you're involved in a gang collateral to that membership or association that may or may not be unlawful.

And we know this is the teaching of *Brown vs. Texas*, which is quoted in the *Ilono H.* case at 454 Ariz. Adv. Rep. 14, on page 15, where it says: We

cannot authorize officers to conduct investigatory detention of individuals merely because they have the wrong color clothing in the wrong part of town.

So that's really all we've got here. We have a belief that this individual may be affiliated with a gang. A desire on the part of the officer to gather intelligence, not to investigate a crime but to gather intelligence, is part of their mission for future reference and for future use and the desire to cordon him away from the others. But all of that is laudable. All of that is not appropriate. For you to put your hands on a citizen, you have to have [56] reasonable suspicion that criminal activity is afoot, not just a belief that a person might be armed and might be dangerous.

Let me read, if I can, because I think it just so aptly sets it out for the Court's decision, a passage from this *In Re Ilono H.*, the case which I just found. I found it's unusual. The Court relied on most heavily in my motion at page –

THE COURT: 16.

MR. DIODATI: – 16, in paragraph 12, continuing on to page 17. We read as follows – this is regarding the right to conduct a pat down search, which is what we're dealing with. The Court of Appeals, Division – Division Two – Division Two – no, Division One says – no, this is Division – I'm sorry, we know this is Eckerstrom, Division Two.

In *United States vs. Burton*, 228 F.3rd 528, 524, Fourth Circuit – the Fourth Circuit articulated the test as follows, colon, An officer may encounter citizens and attempt to question them without implicating the Fourth Amendment. But during such encounter an officer is not entitled to, without additional justification, conduct a protective search. To conduct such protective search, an officer must first have reasonable suspicion supported by [57] articulable facts that criminal activity may be afoot. *United States vs. Gray* requires that a frisk be based on reasonable suspicion that that criminal activity is afoot because, quote, a protective frisk is both a search and seizure for Fourth Amendment purposes, citing *Gomez vs. United States*.

This is important, your Honor. Officer safety concerns should not be considered in determining articulable suspicion. And *State vs. Giltner*, from Hawaii, officer lacking cause for investigatory stop not authorized to frisk defendant despite officer's knowledge defendant has been armed on previous occasion, and then also quoting criminal law professor, Wayne R. LaFave, Section 9.6 (a), if the officer, lacking the quantum of suspicion required by *Terry* to make a forcible stop, instead conducts a nonseizure field interrogation, which is what this is, he may not frisk the person interrogated upon suspicion he is armed. It could not be more straightforward.

If we drop down to paragraph 14, about seven or eight lines down on the right-hand margin, it says: In the context of a consensual encounter initiated by an

officer, those persons targeted by the officer, who not reasonably suspected of criminal activity, also [58] possess the right to be free of unwarranted government intrusion. As Justice Harlin [sic] observed in *Terry*, Any person, including a policeman, could avoid a person he considers dangerous. And dropping down to the last two lines: He certainly not submit to a frisk for the questioner's protection. And it makes reference to LaFave again. When an officer lacks grounds to temporarily detain a person he or she believes may be dangerous, the officer may protect himself by not engaging. No matter how appealing the cart may be, the horse must precede it.

So, Judge, what we're left with when we parse all this out and consider it at every angle, the State, both the officer in her testimony says that if she's got a legitimate fear for officer safety, she can conduct a pat down search. And then we have the State's response if you read, it talks all about officer safety. Half of the equation that's missing is reasonable suspicion.

Now, as the Court is aware, this is a kind of bifurcated scenario because we've got an initial legitimate traffic stop based on a civil traffic infraction and nothing unusual in that stop. We then have the encounter with the passenger at the automobile. And my motion I quote the Supreme Court [59] case that says there's no additional on one's liberty to order passengers out of the car, and that's what happened here – the driver or the passenger. So they get out. But at that moment now, in my view, we are

just about analogous to the picnic table under the ramada in the southside park in *Ilono C* [sic].

Now we've got a pedestrian, because we don't have any reasonable suspicion of criminal activity, when she says – tells him, "Turn around, I'm going to patted you down for weapons," and puts her hands on them, violated Article 2, Section 8 of the Constitution and the 4th. And I believe it warrants suppression of both marijuana and the gun.

And then based on a broader application of Article 2, Section 8, as I argued in my motion, the appropriate remedy here is to dismiss with prejudice the resisting arrest charge. You've also, incidentally, heard evidence he was not pronounced under arrest. She was just concerned about officer safety for which to detain him, so he's not being placed under arrest. And the resisting arrest statute requires actual arrest for probable cause, not just investigatory detention or status quo detention.

So I think it's petty clear. In some ways this is a close case because we have this scanner, and [60] we all think that's unusual. But that – even in combination with everything else, it did not warrant the conclusion. We haven't heard this officer testify she concluded that criminal activity was afoot, and that's what *Terry* required from 1968 through the decade of the '70s, '80s, '90s, and now into the first decade of the 20th century.

The State, I think you can make an argument, doesn't even satisfy the prong wherein is there a

reasonable belief that a person might be armed and dangerous, but they absolutely have no evidence that Lemon Johnson, prior to the moment she puts the hands on him to search him, is engaged in criminal activity or criminal activity is afoot and he's associated with it. That's the teaching in *Terry* and reinforced in *Ilono*.

And I believe it is incumbent upon this Court to give that recognition and give that meaning here today by ordering the evidence of marijuana and the gun be suppressed. That's certainly the fruit of this – of this illegal search. And then also order that the resisting arrest charge, under Article 2, Section 8, of the Arizona Constitution, proper remedy there is to dismiss with prejudice. And the reason that's, Judge, necessary is if you researched the [61] resisting arrest charge, before we revised the criminal code in 1974, the common law says you can resist an arrest.

The teaching now and the authority now is you have to submit to an unlawful arrest and then you fight it out later. Well, to fight it out later must mean if the original detention is unlawful, then the remedy has to be because there's nothing to suppress here, you can't suppress the physical activity that a defendant engaged in. To determine that the initial search and seizure were unlawful and the arrest is unlawful, the only clear remedy has to be dismissal with prejudice. So I think you're entitled to make that under Article 2, Section 8.

Now, I will note that that, I guess – well, I guess that's all I have to say. Thank you, Judge.

THE COURT: I tend to recall case authority that suggests what you said in the first place, and that is you can't – you can't even – if the arrest is unlawful, you can't resist that arrest. I think that's the status of the law, if I recall from prior – but let's go back.

And Ms. Arizpuru.

MS. ARIZPURU: Your Honor, just briefly.

Mr. Diodati brought up that once Mr. Johnson [62] is out of the car, he's the same as the defendant who was sitting in the park under a ramada. Well, just because he gets out of the car does not mean that the officer needs to forget everything that happened before. She doesn't need to forget about the defendant's behavior when the car was being stopped, the statements made to her while he's in the car, what she observed of him while he was in the car with this scanner, and the clothing and the bandanna. It's more than just the clothing. There was more to it than just that. And just because he's now out of the car doesn't mean that she needs to forget that. There was no requirement under *Terry* that there be probable cause to arrest.

And Officer Trevizo indicated she didn't have probable cause to arrest for any particular crime. But based upon the evidence that she had, she did not

think that Mr. Johnson was on the up and up with this scanner and with the statements that he had made. She wanted to do some more investigation. She wanted to talk to him to see what was going on. It wasn't an officer coming upon a scene where the only thing she has to deal with are the colors that he's wearing. In this case, there was more to that, and she's not required to forget about that when the [63] defendant steps out of the car. She had sufficient information to believe that there was something going on. And then to have a reasonable belief based upon the information that she had that the defendant may be armed, for that reason the search was a valid search and the State requests that you deny the defendant's motion.

THE COURT: As I stated earlier, I'm trying to think what to do. I need to look at some things. I'd like to make a ruling right now, but I think we need to be prepared to go ahead and do the thing.

First of all, I don't fault the officer for what she did. I want you to understand that. It seems to me what we have here is a perfectly reasonable stop and perfectly – and I'm inclined to believe there's a justification to believe that there's a dangerous situation.

The problem that we have is lack of criminal activity, is somewhat problematic. And even though we have the stop under the circumstances, what I have to be convinced of the original stop was even though it turned out to be a civil infraction, that certainly can lead to a concern for officer safety and

whether or not there's reasonable basis that's an objective test for officer safety at this point and factors that [64] would point to that. Problem is the connection whether or not it's considered one whole concept or whether or not the original – the original stop in circumstance has to be for criminal activity.

I look at quite a number of cases. Of course, you know, that I have and been re-reading *Ilono*. I look at *Garcia* also, which I think is a case that supports the defendant's view on the reasonableness of the stop or on the justification for the pat down. And Garcia, at 169 Ariz. 530, and even within *Ilono*, the factors that we have here in this case far exceed the factors in *Ilono* that would support, you know, the officer's action of the pat down. And the problem is that her admission that she wasn't really aware of any particular illegal activity in the area is troublesome, and that's why what I have to look at.

And so I think what I'd like to do at this point is plan to begin tomorrow with the trial at 10:00 o'clock, and I'll give you a ruling before we come in.

Can we finish the jury selection in the morning on that?

MR. DIODATI: I don't anticipate it's going to be a problem. In looking at a previous transcript [65] in this case, at one point this was set for a 12-person jury.

Do you have it set for a 12-person? Because I don't think it qualifies.

THE COURT: I was going to go over two or three things with you on that, and let's do that for a second at this time. And I calculated it as an eight-person jury.

Do you disagree with that?

MS. ARIZPURU: Your Honor, to be completely honest, I have no idea.

THE COURT: Okay.

MS. ARIZPURU: I didn't go through and do the math. I think it's a Class 4 with, I think, two allegations of priors.

THE COURT: Yeah. I calculated that the Class 4 – the class – the first one is six to fifteen, and the other two are Class 6s and Class 5s, which would be 2.25 to 5.7 – and – wait, that wouldn't be right. One is a Class 6, and even at that I think a total max would be about 26.

MR. DIODATI: Yeah. I believe – aren't they both 6s? The possession of marijuana –

THE COURT: They're both 6s. You're right. They're both 6s.

[66] MR. DIODATI: I think the max on that is 3.75 with two priors.

THE COURT: It's 5.75.

MR. DIODATI: Yeah, 5.75. So I count maximum 26.5. So that's what I have. So I think I believe it's an eight-person jury.

MS. ARIZPURU: That's fine.

THE COURT: Was there an amendment to the indictment that came along that's different than the original indictment? Are you familiar with that? I thought I read quickly through the file, I want to make sure we don't have any problem on that.

MR. DIODATI: No.

THE COURT: Witnesses, I'd like to check this. I have Officer Dave Gittings, Officer Jack Machado, Officer Maria Trevizo, I have a criminalist Brooke Arn –

MS. ARIZPURU: Arnone.

THE COURT: Arnone. Defense had Breda Delapaz and Alicia Perkins.

MS. ARIZPURU: Actually, those are the State's.

THE COURT: State's witnesses?

MS. ARIZPURU: Yes.

THE COURT: Added – Detective – and [67] defense witnesses.

MR. DIODATI: Can we go back to those last two names, because they have no meaning to me.

MS. ARIZPURU: Breda is the one who rolled the fingerprint, and Alicia is the one that did the analysis of the fingerprints.

MR. DIODATI: It's a team. Can I go back and look at the file?

There was a timely request a long time ago under 15.2 to have him submit to that, so I don't object to those two witnesses –

THE COURT: Okay.

MR. DIODATI: – timeliness grounds.

And the only potential witness that the defense has, and I'm expecting, if we go forward with the trial, all these officers testified at no time did Officer Trevizo say my client was under arrest. And the only potential witness that I would have beside my client is – is his girlfriend, Ms. Christine Allen who you heard testify before in the Rule 11. And she was – you did not hear, but there will be testimony, if this matter goes to trial, about the telephone – my client's cell phone ringing during the tussle that was ensuing, and his engaging in a brief conversation. And she was on the other end of the telephone [68] conversation.

MS. ARIZPURU: Had you disclosed her before?

MR. DIODATI: I thought it was in the joint pretrial statement, but I don't know. I don't anticipate calling her really.

THE COURT: Usually advise the jury, but I always check with the defense the legal presumption that the – the legal propositions that the defendant has a right not to testify. And – unless you ask me not to do –

MR. DIODATI: No, I would prefer that you go ahead.

THE COURT: And rule of exclusion of witnesses, is that going to be imposed by either counsel?

MR. DIODATI: I probably will ask that that occur, Judge.

THE COURT: I'll have some standard instructions for you. My regular instructions in the morning, and I'll give you those, and I usually read the rule of exclusion, although it's not included in the standard instructions I have. I know Ms. Arizpuru has seen that.

And then priors hearing, I guess there will be, and that's going to be a matter that –

[69] MS. ARIZPURU: Actually, your Honor, because the defendant is not willing to stipulate to the fact that he was a prohibited possessor at the time, we're going to be – and the reason that we have Breda Delapaz as well as Alicia Perkins is to prove up that he has prior felony convictions to prove the status. So I think that instead of doing two, if the Court can take note – well, I guess he can't because the Court – we can't present what they were for.

THE COURT: Timewise, this is going to – this is what will happen, and that is if the jury comes back with a conviction, then we go into an aggravation stage. I have instructions now that I use that would, you know, tell them.

MR. DIODATI: I don't believe that's going to be necessary because there are no – there's was no amendment to the indictment to add aggravated. The only one are the priors, and I believe the Court finds the priors. There's no need for a jury to determine priors.

THE COURT: You all agree with that?

MR. DIODATI: Yeah, your Honor, I do concur.

THE COURT: So you waive any kind of issue as far as a jury determination on that?

MR. DIODATI: I believe that's the only [70] mandatory enhancing factor, is the allegation of the two priors. And I may make some evidentiary challenges during the presentation of the State's case in chief because it also would be indirectly an element of why he might be a prohibited possessor. But I agree that if there's a conviction, then it's for the Court to determine the existence of the prior convictions.

THE COURT: Okay. Well, there is a possession by prohibited possessor, so there will be some evidence with regard to the prior convictions from that standpoint.

MR. DIODATI: There has to be. Well, I suppose I could stipulate, but I'm not willing to do so.

THE COURT: So you'll have to have that in the case in chief.

MS. ARIZPURU: Correct. And that's who Breda Delapaz as well as Alicia Perkins, and they're going to testify – it was done through fingerprints. Alicia Perkins is going to come in and testify she did the comparison with the defendant's prints that were rolled by Breda, and then compare them with his DOC pen pack, and they were a match.

THE COURT: So the biggest issue we have [71] right now is if we do the jury tomorrow morning, you're asking that we come back on Thursday morning and do the trial, which you think will be done in one day. And what my experience has been, that could really push the jury to the end of the day. And we have a holiday on Friday. And so that really is tough to do that.

My original intent was to bring you back on Wednesday afternoon, because you're done – you'd be done in the morning with the other thing. Sorry I'm putting you through that.

MR. DIODATI: Well, –

THE COURT: But, you know, it's – this has been out here for a long time. Mr. Johnson has been involved in jail.

MR. DIODATI: Right, which is a topic that we have to talk about related to jail clothing. Just don't let me forget – I mean, street clothing for trial.

MS. ARIZPURU: And that was something else. Depending on the ruling, I know you thought about possibly, since the issues have been preserved, doing a bench trial.

MR. DIODATI: Yeah, I and discussed that with him, and I think we're going to do –

[72] MS. ARIZPURU: That's fine.

THE COURT: Okay.

MS. ARIZPURU: You know, and like I said, if – I can be available on Wednesday. That's not going to be a problem, so . . .

MR. DIODATI: What time is the funeral?

MS. ARIZPURU: 2:30.

MR. DIODATI: In town?

MS. ARIZPURU: Yes.

THE COURT: I hate to do this, but under the circumstances –

MS. ARIZPURU: That's fine, your Honor.

THE COURT: – I think we're going to have to go ahead. And – if we don't, we'll just have the jury come back on Thursday, and I'm real worried that –

MR. DIODATI: Your Honor, what's the Court's dark morning?

THE COURT: Tuesday. And so I'm trying -- I'm using some of my dark time tomorrow to start at 10:00 o'clock. So you if all come ten till, obviously, before we get started. It's – you know, I haven't decided. I want to go back and look to see if I've got something. And it's a close issue to me, quite honestly. Again, not for anything that the [73] officer did, but because of the law that we have to apply. I'm going to look at it and see what kind of position it might entail.

So I'll see you between quarter till and ten till, and we'll have your instructions. We'll do the jury instruction tomorrow, and right now bring the jury back on Wednesday afternoon at 1:30 and do everything we can that day. And we may get done then, and we may have bring them back on Thursday for –

MR. DIODATI: And, your Honor, if the final issue dangling out there, Mr. Johnson has availed himself of three hots and a cot, and he's been in custody for over a year now, and his clothes don't fit him. His fiancee is here. We'll get her a check in the morning. We can't get clothing that fits him out there tonight. I would ask the court to allow the jail staff to inspect some clothing when he's in the holding cell tomorrow morning and allow him to dress in the holding cell tomorrow morning.

THE COURT: Well, I know they don't like to do that, but under the circumstances I guess

people gain weight or – weight or something like that. And as long as we do have clothing tomorrow so that can be done, I ask that the defendant be available by 9:30 so he can make the change tomorrow.

[74] I need your help with that reluctantly, but thank you.

THE DEPUTY: You got it, your Honor.

THE COURT: Thanks. Okay, see you all tomorrow.

(Proceedings concluded.)

[75] CERTIFICATE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, Cheryl Austin, do hereby certify that as an Official Court Reporter for the Pima County Superior Court, I reported the foregoing proceedings to the best of my skill and ability; and that the same was transcribed under my supervision via computer-aided transcription; and that the foregoing pages of type-written matter are a true, correct, and complete transcript of all the proceedings had as set forth in the title page hereto.

CHERYL L. AUSTIN, CRR,
RMR, CCR
Certified Court Reporter #50029

date

My Commission Expires
January 31, 2010

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Plaintiff, vs. LEMON M. JOHNSON Defendant.	CR-20021357 2 CA-CR 2006-0079

BEFORE: THE HONORABLE TED B. BOREK
Judge of the Superior Court
Division 24

APPEARANCES: CYNNAMON ARIZPURU
Deputy County Attorney
on behalf of the State;

ANDREW DIODATI
on behalf of the Defendant.

REPORTER'S TRANSCRIPT ON APPEAL

JURY TRIAL DAY ONE

TUCSON, ARIZONA

NOVEMBER 8, 2005

Reported By: CHERYL L. AUSTIN, OFFICIAL RMR, CRR, Certified Reporter #50029

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[3] PROCEEDINGS

THE COURT: This is State of Arizona vs. Lemon Montrea Johnson. It's CR-20021357.

Appearances, please

MS. ARIZPURU: Good morning, your Honor. Cynnamon Arizpuru on behalf of the State.

MR. DIODATI: Good morning, your Honor. Andrew Diodati for Lemon Montrea Johnson, present in civilian clothing but in custody at counsel table.

THE COURT: Thank you very much.

The first thing to deal with is the motion that we had yesterday, and we do have one of those situations where the motion came late in filing. And I just wanted for the record to reflect that I know that Mr. Diodati has been very, very involved in the trial for a period of time. But I did get – I mean, I think it's been an eight-week trial, so getting it filed when it is – but this is an old case, and we did have one of these coming quickly on the heels. It would have been helpful to have had it so I could have looked at some research and what have you, but it's pretty clear principles of law that apply. But – and I'm not faulting anybody for

that, except that I think the State did have – sort of under the gun to get a response also.

Ms. Arizpuru did send me a case that she asked [4] me to read. I mentioned it to Mr. Diodati earlier. It's *State vs. Dixon* at 24 Ariz.App. 303. I did some research last night, and I'll just – from a California case that deal with stops for vehicles. The one that I have here is *People vs. Franklin* at 171 Cal.App.3rd, 627. It recites principles from the *Terry* stop kinds of things. And quotation in that case from 534: It is well settled that police officers have the right to conduct a pat-down search for weapons when they have specific and articulable suspicion that a person detained for a traffic violation is armed and dangerous.

Court emphasizes, in order to justify a weapons search incident to a lawful detention or stop, the officers need not be absolutely certain that the detainee is armed. But the issue is rather whether a reasonably prudent person – and it says man – under the – under similar circumstances would be warranted in his belief that safety was in danger.

And another California case that deals with *Terry*, *People vs. Lawler* at 9 Cal.3rd 156. There was a contention that the defendant's violation of hitchhiking does justify a pat down, and the Court said there: We do not believe that such a violation per se afforded probable cause for the search. Indeed, and it goes on, in a typical pedestrian violation case, the circumstance [5] justifying detention did not furnish probable cause to pat down. This is the issue that I think

focuses on it. We have a traffic stop, in essence, for something and then we have the pat down.

There's one other case that is a Washington case dealing with the principles. It's *State vs. Feller*. It's at 60 Wn.App. 678, and that just talks in terms that the State argues: An arrest for a minor traffic offense falls between custodial arrest and *Terry* stop and, therefore, a protective search may be made until the officer determines whether the arrest will become custodial. In our view, stopping for a traffic violation, detaining a person during a brief investigation falls within the due process standards. And such situation, when an officer has reasonable grounds to believe that a person is armed and presently dangerous, the officer may do a pat down for such weapons.

This is what I was able to do after the argument yesterday. And based on the evidence that I have, I'm going to deny the motion to suppress. And, you know, with the cases that have been cited, I'm distinguishing the *In Re Alano* [sic] case that the defense cited. What we basically have here is legitimate stop for what turns out to be a civil matter. But in *Alano*, of course, it was [6] the stop that was the problem, and they even had some language in there that suggested the factors such as we have in this case with regard to the potential gang affiliation or the colors or what have you, are factors that the police officer knew and was concerned about and increased the safety kind of issue.

I think that the *Garcia* case, at 169 Ariz. 530, where officer saw bullets indicated that there was a possibility – in a car – possibility of danger is similar although certainly not the same.

Many factors that we have here is I think first the car and the stop, the officer subject didn't know what the status was. But in this case the stop itself was a factor that when you have a car that's not registered, it gives perhaps some suspicion that something is afoot. We also have the gang colors and this officer knowing about the gang kinds of situations, and the defendant being in a gang right on the border, and the bandanna and the clothing is something that was certainly suspect. And I think that this officer indicated she did not – gang members similar to *Alano* carried weapons.

The coming from Eloy is just another factor in the totality of the circumstances that would cause concern. The scanner, I think, is a very important part [7] as far as believing – and I realize that's not a weapon, but it's certainly something that suggests, perhaps, a danger and suspiciousness and reasonableness of the danger. We have other officers in the car in the area which causes concern, the lack of identity of the defendant and his acknowledging being in the Department of Corrections previously, before the pat down. And this was just really was just a pat down; it didn't go any further than that, and that's what happened.

So I think under the circumstances there was a reasonable basis to believe there was a danger, and a stop allowed them to go ahead and do the pat down. So for those reasons, I'm denying the motion to suppress. Considered based on the record the whole and the totality of the circumstances.

With that, Mr. Johnson, I want you to know that I did talk to the lawyers this morning and gave them a copy of a book that has the preliminary instructions in it for the case. They are pretty standard, and I've given them a chance to look at that and the indictment form. So I don't think that there's anything either of you need or want to put on the record, but there's a chance from our previous discussion if there's anything from the State.

MS. ARIZPURU: No, your Honor. Nothing from the

* * *

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. TED B. BOREK

COURT REPORTER: Cheryl Austin Courtroom: 583

STATE OF ARIZONA

VS.

LEMON MONTREA JOHNSON

FILED
PATRICIA A. NOLAND
CLERK,
SUPERIOR COURT
November 8, 2005
(2:40 p.m.)
By: Judy Etchison

CASE NO. **CR20021357**

DATE: November 08, 2005

Cynnamon Arizpuru

Andrew Diodati

MINUTE ENTRY

JURY TRIAL – DAY ONE:

10:30 a.m. Counsel and Det. Jack Machado present; defendant present in custody.

Out of the presence of the prospective jurors:

As to defendant's Motion to Suppress:

IT IS ORDERED the Motion to Suppress is denied.

The Court advises the defendant that the Court met with counsel in chambers regarding trial scheduling.

10:40 a.m. In the presence of the prospective jurors:

Counsel announce ready to proceed.

The Court directs the clerk to swear the prospective jurors on voir dire and to call 22 into the box.

The Court states the nature of the case generally and questions the prospective jurors generally and individually on voir dire.

EXCUSED FOR CAUSE	*CALLED IN THEIR STEAD*
Gregory Charles Schaeppi	Cynthia Lea Dunnavant
Paul Stewart Platt	Anna Christine Cinquemani

The Court reads the Indictment and defendant's plea of not guilty as to each count.

EXCUSED FOR CAUSE	*CALLED IN THEIR STEAD*
Vivian Rosilda Sutherland	Kalman Raphael Katz
Donald Leonard Saffer	James Martin Schelble
James Martin Schelble	Jack D. Barbieux

Counsel further question the prospective jurors on voir dire.

EXCUSED FOR CAUSE	*CALLED IN THEIR STEAD*
Ellyn Kay Wickliffe	Lon Duane Chaney

Counsel having made their peremptory challenges, the following 10 jurors are sworn to try the case:

1. Justen Wayne Johnson
2. Antonio Escalante
3. Robert William Binder
4. Dov M. Citron
5. Manuel Carbajal
6. Virginia Nicole Easton
7. Christopher A. Beuckman
8. Lon Duane Chaney
9. Jennifer Celeste Neto
10. Mark Ryan Decker

12:28 p.m. The Court admonishes the jurors and they are excused until November 9, 2005 at 1:30 p.m.

cc:

County Attorney – Arizpuru
Andrew Diodati, Esq.

Judy Etchison
Deputy Clerk

PETITIONER'S BRIEF

101

(4)

No. 07-1122

FILED
AUG 29 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

vs.

LEMON MONTREA JOHNSON,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

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OPINIONS BELOW

The Pima County, Arizona, Superior Court denied Respondent Johnson's Motion to Suppress on November 8, 2005. (J.A. 78.) The Arizona Court of Appeals' opinion reversing is reported as *State v. Lemon Montrea Johnson*, 217 Ariz. 58, 170 P.3d 667 (App. 2007). (Pet. App. A.) The Arizona Supreme Court's order denying review without comment is not reported. (Pet. App. B.)

STATEMENT OF JURISDICTION

The Arizona Court of Appeals, Division Two, entered its judgment on September 10, 2007. (Pet. App. A.) The Arizona Supreme Court denied discretionary review on November 30, 2007. (Pet. App. B.) This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case involves a valid traffic stop for a registration violation and a pat-down search of the backseat passenger. Although the police officer lacked articulable grounds to believe that the passenger was committing, or had committed, a criminal offense, the officer reasonably believed that the passenger might be armed and posed a safety risk.

The Arizona Court of Appeals determined that the pat-down search was unconstitutional. It reasoned that a passenger, temporarily seized in a lawful traffic stop and engaged in a conversation with an officer about street gang activity, is not subject to a pat-down search for weapons even though the officer reasonably believes the passenger is armed and presently dangerous. The state court's opinion violates the spirit and purpose of this Court's prior decisions by substantially inhibiting a search for weapons based on reasonable officer safety concerns while conducting legitimate traffic stops.

A. Suppression Hearing.

Prior to trial, Respondent, Lemon Montrea Johnson, filed a motion to suppress evidence discovered during a pat-down search of his person. (Motion to Suppress/Dismiss, filed 10/31/05.) The trial court

conducted an evidentiary hearing, and Officer Maria Trevizo testified that she was a member of the state gang task force. (J.A. 8.) She had attended basic and advanced training in gang enforcement and had two years' on-the-job experience. (*Id.*) On April 19, 2002, she was on patrol with Detectives Machado and Gittings, fellow members of the gang task force, in the "Sugar Hill" area of Tucson which was known to be a Crips street gang neighborhood. (*Id.* at 10-11.) Street gang members, she testified, were known to possess firearms. (*Id.*) The task force members were in an unmarked vehicle equipped with emergency lights. (*Id.* at 26-27.)

One of the officers ran the license plate number on a vehicle traveling on a major street bounding the Sugar Hill neighborhood, and the plate number came back with a mandatory insurance suspension, a civil infraction warranting a citation. (J.A. 11-12, 44.) The task force initiated a traffic stop of the vehicle. (*Id.*) The vehicle had three occupants – a driver, a front-seat passenger, and a back-seat passenger. While Officer Trevizo approached the vehicle on foot, she noticed Johnson, the back-seat passenger, look back at the police vehicle, say something to the people in the front seat, then continue to look back at the police vehicle. (*Id.* at 12-13.) Trevizo viewed this behavior as unusual because people normally look frontwards during a traffic stop. (*Id.*)

Detective Machado contacted the driver, asked everyone in the car to put their hands where he could see them, and asked the driver to exit the vehicle.

(J.A. 14-15.) Detective Gittings made contact with the front-seat passenger, who remained seated throughout the stop, and Officer Trevizo made contact with Johnson. (*Id.* at 14-15, 30-31.) Either Machado or Gittings asked whether weapons were in the vehicle, and all of the occupants said "no." (*Id.* at 15.) Trevizo asked Johnson whether he had identification with him, and Johnson said "no." (*Id.*) Trevizo testified, "What struck me as highly unusual and cause for concern is there was a scanner in [Johnson's] jacket pocket." (*Id.* at 16.) She testified:

> It caused me concern because most people don't carry around a scanner in their jacket pocket unless they're going to be involved in some kind of criminal activity or going to try to evade the police by listening to the scanner.

(*Id.*) Although the scanner was not illegal, she said it was unusual in her training and experience for someone to carry a scanner in his pocket. (*Id.* at 17.)

Trevizo also noted Johnson's blue shirt, shoes, and bandanna. (J.A. 17.) She knew that Crips announce their gang affiliation by wearing blue clothing. (*Id.*) She saw particular significance in Johnson's bandanna because bandannas sporting gang colors are an insignia for the gang. (*Id.* at 17-18.) She testified that the colors Johnson wore announced his street gang affiliation. (*Id.* at 27.)

While Johnson was still seated in the back seat, he volunteered that he was from Eloy. (J.A. 19.)

Trevizo knew from experience that the predominant street gang in Eloy was the "Trekkle Park Crips." (*Id.*) Johnson also told Trevizo that he had done prison time for burglary and had been out of prison for about a year. (*Id.*)

Trevizo asked Johnson to exit the vehicle, intending to speak with Johnson away from the other occupants to gather intelligence about his gang. (J.A. 19-20.) She said he could have refused to get out. (*Id.* at 41.) Once Johnson was out of the vehicle, Trevizo asked him to turn around because she was going to pat him down. (*Id.* at 21-23.) Trevizo had not indicated to Johnson her intent to pat him down. (*Id.*) She said she patted Johnson down solely for officer safety "because I had a lot of information that would lead me to believe he might have a weapon on him." (*Id.* at 20.) She stated, "I did not have probable cause at that point to believe that he was involved in criminal activity." (*Id.* at 36.)

Trevizo stated that she did not seek Johnson's permission to pat him down. (J.A. 34-36.) She testified, "I guess he could have said no at that point." (*Id.* at 34.) Johnson turned around and, without direction to do so, raised his arms. (*Id.* at 23.) Trevizo patted down his exterior clothing and felt the butt of a handgun in his pants' waist. (*Id.* at 24.) Only then did Johnson begin to struggle a bit. (*Id.*) Trevizo then handcuffed him. (*Id.* at 39.) She testified that Johnson was not under arrest; she handcuffed him only so that he could not reach his gun. (*Id.* at 40.)

Officer Trevizo's encounter with Johnson took place while Detective Machado dealt with the driver. The prosecutor asked Trevizo, "[D]id [Detective Machado] ask the driver of the vehicle to step out of the car?" (J.A. 14.) Trevizo answered, "Yes, all of this is kind of happening simultaneously." (*Id.*) On cross-examination, Johnson's counsel asked Trevizo, "So Machado is dealing with the driver, Gittings is dealing with the front passenger, you're dealing with my client?" (*Id.* at 31.) Trevizo answered, "Yes, sir." (*Id.*) Later, the judge asked Officer Trevizo, "At the time that you approached the defendant in this case, what was happening to the driver of the vehicle, to your knowledge?" (*Id.* at 42-43.) Trevizo responded, "To my knowledge, Officer Machado was just getting his basic information: driver's license, registration, insurance"; "I did not overhear any conversation between Detective Machado and the driver. They were behind me." (*Id.*)

Officer Trevizo gave eight grounds for believing that Johnson was armed and dangerous: (1) Johnson watched the officers out the rear of the car as they approached the vehicle; (2) Johnson did not have identification on his person; (3) Johnson carried a police scanner in his jacket pocket; (4) Johnson was wearing a blue shirt, shoes, and bandanna; (5) the traffic stop took place near a known Crips neighborhood; (6) Johnson told Trevizo that he was from Eloy,

Arizona;[1] (7) street gang members were known in general to the task force to carry firearms; and (8) Johnson told her he had done time for burglary and had been out for about a year. (J.A. 10-19.) Trevizo said that it was not any one specific circumstance but rather the totality of these circumstances that contributed to her concern for officer safety. (*Id.* at 21.)

At argument on the motion to suppress, Johnson argued that he had consented to talk with Trevizo outside the car but had not consented to the pat down. (J.A. 52-58.) Johnson did not expressly challenge the reasonableness of Trevizo's belief that he was a gang member and may have been armed. (*Id.* at 53-54.)

The trial court denied the motion to suppress, concluding: "I think under the circumstances there was a reasonable basis to believe there was a danger, and a stop allowed them to go ahead and do the pat down." (J.A. 77.) In November 2005, a jury in Pima County, Arizona, found Johnson guilty of possession of a weapon by a prohibited possessor and possession of marijuana.

---

[1] Eloy, Arizona, has a population of approximately 10,375 (according to the U.S. Census Bureau's 2000 census) and is located 51.5 miles northwest of Tucson.

B. Arizona Court of Appeals' Opinion.

On direct appeal, Johnson contended that the trial court erred in denying his motion to suppress evidence because Officer Trevizo lacked reasonable suspicion to conduct a protective frisk of his person, and even if supported by reasonable suspicion in this case, a protective frisk was unconstitutional during what he claimed to be a consensual encounter. (Opening Brief, filed 11/13/06.) The Arizona Court of Appeals "assum[ed], without deciding, that Trevizo had reasonable suspicion that Johnson was armed and dangerous." (Pet. App. A at 13-14, ¶ 26.) The court also found that Johnson was seized pursuant to a lawful traffic stop of the driver. (*Id.* at 8-9, ¶ 16.) But the two-judge majority reversed Johnson's convictions, finding that Officer Trevizo's encounter with Johnson had "evolved" from an investigative stop to a consensual encounter when Johnson exited the back seat of the vehicle to talk with Officer Trevizo. (*Id.* at 14, ¶ 27.) The majority held that "when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purpose of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger without reasonable cause to believe 'criminal activity may be afoot.'" (*Id.* at 15-16, ¶ 29) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

One judge dissented, concluding that "[v]iewing the evidence under the totality of the circumstances realistically and in a light favorable to upholding the trial court's determination, Trevizo was lawfully in

Johnson's presence, the encounter was nonconsensual, and the officer had a reasonable basis to consider him dangerous and therefore conduct a brief pat-down of his person." (*Id.* at 22-23, ¶ 39) (citation omitted).

SUMMARY OF ARGUMENT

The pat down in this case, involving a vehicle passenger but no suspicion of criminal activity, fell within the guidelines established in *Terry*. Pat downs are permitted anytime they are reasonable, and they are reasonable when an officer lawfully seizes a person and has a reasonable belief the person is armed and dangerous. A stop to investigate whether "criminal activity is afoot" is only one type of police-civilian encounter in which a pat-down search may be permissible. As long as the officer has a reasonable belief that a passenger is armed and dangerous, the Fourth Amendment allows a pat-down search of a passenger in a vehicle stopped for a traffic infraction even where no criminal activity is suspected.

The traffic stop in this case had not ended by the time the officer conducted the pat-down search of Respondent Johnson based on officer safety. The encounter was not consensual, as the state court found, and Johnson was not free to leave. Moreover, a person's ostensible freedom to leave the scene does not render a safety pat down unconstitutional. There is no prohibition on conducting a pat-down search of a

passenger during a traffic stop as long as the initial seizure is lawful and the officer reasonably believes the passenger is armed and dangerous. This case shows that no other requirements make sense if the sole purpose of a frisk is officer (and public) safety.

ARGUMENT

A Pat-Down Search of a Vehicle Passenger for Officer Safety Following a Lawful Investigative Stop of the Driver Is Permissible under the Fourth Amendment.

This case concerns whether an officer may conduct a pat-down search of an automobile passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but lacks articulable grounds to believe that the passenger is committing, or has committed, a criminal offense. Based on this Court's prior decisions, a pat-down search should be permissible under these circumstances. If a police officer legally stops a vehicle, the officer temporarily seizes all of its occupants. *Brendlin v. California*, 127 S. Ct. 2400, 2406 (2007). A passenger is seized as part of a traffic stop irrespective of any suspicion of wrongdoing focused on that passenger. *Id.* at 2407. As this Court has recognized, roadside vehicle stops are risky and volatile, and pose unique dangers for police officers. *See, e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 414 (1997); *Michigan v. Long*, 463 U.S. 1032, 1047 (1983); *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977) (per curiam); *United*

States v. Robinson, 414 U.S. 218, 234 n.5 (1973); *Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972). When the officer has reasonable grounds to believe that a person seized during a lawful traffic stop is armed and possibly dangerous, the officer is permitted to conduct a pat-down search of that person's outer clothing for weapons. *Long*, 463 U.S. at 1047-48; *Mimms*, 434 U.S. at 111-12; *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

Thus, a police officer like Officer Maria Trevizo in the present case, reasonably fearing for her safety during a lawful roadside vehicle stop, may ensure her own safety and that of others present by patting down a suspicious passenger for weapons.

A. The Fourth Amendment permits an officer to conduct a pat-down search of a passenger during a traffic stop when the officer has reasonable grounds to believe that the passenger is armed and dangerous.

In *Terry*, this Court held that a police officer may conduct a pat-down search of a person if the officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." 392 U.S. at 30. The police officer may conduct a protective search under these circumstances "regardless of whether he has probable cause to arrest the individual for a crime." *Id.* at 27. The "narrow scope"

of this exception to the warrant requirement limits the officer to search only for weapons and only upon "reasonable belief or suspicion directed at the person to be frisked." *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979).

This Court has since applied *Terry*'s principles to traffic stops, holding that police officers may require the driver to exit the vehicle and may pat down the driver for weapons when the officers have specific and articulable suspicion that the driver is armed and dangerous. *Mimms*, 434 U.S. at 111-12. In *Mimms*, this Court weighed the public's interest in allowing an officer to take precautionary safety measures when he confronts a driver for a traffic violation against "the individual's right to personal security free from arbitrary interference by law officers." *Id.* at 109. The Court concluded that the officer's safety takes precedence under these circumstances because the additional intrusion is *de minimis* when an officer asks the driver, a person already lawfully detained, to exit a lawfully stopped vehicle. *Id.* at 111-12. This Court held that, once the driver was out of the car, the pat down of the driver was reasonable in view of the suspicious bulge in the driver's jacket. *Id.*

This Court subsequently extended the bright-line rule in *Mimms* to vehicle passengers, holding that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop. *Wilson*, 519 U.S. at 415. In *Wilson*, this Court found that "the same weighty interest in officer safety is present regardless of whether the occupant of the

stopped car is a driver or passenger." *Id.* at 413. In addition, the Court reiterated that the interest in officer safety outweighs the minor intrusion on passengers who are "already stopped by virtue of the stop of the vehicle." *Id.* at 414.

The logical implication of *Wilson* is that an officer may pat down passengers when reasonable grounds exist based on the need for officer safety. *See Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (acknowledging in *dictum* that police officers "may order out of a vehicle both the driver, and any passengers; [and] perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous.").

This Court's recent decision in *Brendlin* confirmed the soundness of the *Knowles dictum*. In *Brendlin*, the Court held that a passenger is seized equally with the driver during an automobile stop. 127 S. Ct. at 2406. Accordingly, because the traffic stop constituted a seizure of the car passenger, the passenger in that case had standing to challenge the reasonableness of the stop. This Court wrote:

> An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion

> owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.

Id. at 2407 (internal citation omitted).

Together, this Court's precedents, from *Terry* to *Brendlin*, support permitting a pat-down search of a passenger of a vehicle following a lawful stop of the vehicle if the officer has a reasonable belief the passenger is armed and dangerous. *See Mimms*, 434 U.S. at 111-12; *Long*, 463 U.S. at 1047-48. Under these circumstances, the officer need not suspect the passenger of criminal activity to conduct a pat-down search for officer safety. *See Terry*, 392 U.S. at 30. Rather, the issue is whether the interference with the suspect's personal security is reasonable. *See id.* at 19. This Court has framed the inquiry as a dual one: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20. Courts will analyze what a reasonably prudent police officer would have done under the same circumstances. *Id.* at 27.[2]

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[2] Not surprisingly, lower courts have approved protective pat-down searches of vehicle passengers in the absence of any individualized suspicion of criminal activity. *See, e.g., United*

(Continued on following page)

While in general the suspicion that "criminal activity is afoot," *Terry*, 392 U.S. at 30, often provides grounds for an initial investigative stop, this will not necessarily be the case with investigative traffic stops where the suspected wrongdoing is often a driving or registration infraction. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810 (1996).

In the present case, there is no dispute that the investigative traffic stop "was justified at its inception" based on an insurance suspension. Therefore, during this traffic stop, Officer Trevizo could pat Johnson down if she had reasonable safety concerns that justified the pat down. *Mimms*, 434 U.S. at 111-12.

States v. Rice, 483 F.3d 1079, 1084 (10th Cir. 2007) (reasonable suspicion existed for pat-down search of vehicle passenger where no criminal activity suspected); *Holeman v. City of New London*, 425 F.3d 184, 192 (2nd Cir. 2005) (officers were justified in performing a pat down of passenger even though circumstances did not reasonably indicate crime was afoot); *United States v. Moorefield*, 111 F.3d 10, 13 (3rd Cir. 1997) (without reason to believe car's occupants were engaged in criminal activity, police officers lawfully ordered passenger to remain in the car and put his hands in the air while the traffic stop was being conducted); *United States v. Fryer*, 974 F.2d 813, 819 (7th Cir. 1992) (search of passenger compartment and occupants of vehicle in absence of criminal activity justified by passenger's furtive movements); *United States v. Colin*, 928 F.2d 676, 678 (5th Cir. 1991) (police lawfully searched passenger after stopping car for seatbelt infraction).

Even though Johnson was not the target of the officers' initial inquiry, he was seized as part of the traffic stop. *See Brendlin*, 127 S. Ct. at 2406. Johnson's gang colors, his lack of identification, his prison record, the police scanner in his jacket pocket, his furtive observation of the officers, as well as the neighborhood in which the incident occurred, considered in their totality, raised reasonable safety concerns for Officer Trevizo as she spoke with Johnson pending completion of the investigation. No obvious criminal activity was present or necessary to conduct the pat down. Rather, the legitimate concern for officer safety justified the pat down in this case.

B. The Arizona Court of Appeals erred when it held that the pat down of Johnson violated the Fourth Amendment because the court erroneously assumed Johnson was no longer seized when the officer conducted the pat down.

Terry inquires "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20. With respect to the second inquiry, the Arizona court erred by concluding that Johnson believed he was free to leave his encounter with the officer because "Trevizo's questioning of Johnson was wholly unrelated to the stop and constituted a separate, and consensual, encounter." (Pet. App. A at 12, ¶ 23.) The Arizona Court of Appeals erred in two respects. First,

its premise was wrong because Johnson was still seized when Officer Trevizo frisked him. Second, even if the encounter somehow became consensual, that did not prohibit Trevizo from frisking Johnson based on her reasonable belief that he was armed and dangerous.

1. Johnson was still seized when the officer conducted the frisk.

In light of this Court's decision in *Muehler v. Mena*, 544 U.S. 93 (2005), a police officer can validly ask questions during a lawful traffic stop that are unrelated to the stop as long as the separate questioning does not prolong the stop. *See id.* at 100-01. In *Mena*, officers executing a search warrant of premises for deadly weapons and evidence of gang membership detained and questioned an individual on the premises about her immigration status. This Court approved the questioning:

> We have "held repeatedly that mere police questioning does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L.Ed.2d 389 (1991); *see also INS v. Delgado*, 466 U.S. 210, 212, 104 S. Ct. 1758, 80 L.Ed.2d 247 (1984). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Bostick*, *supra*, at 434-435, 111 S.Ct. 2382 (citations omitted). As the Court of Appeals did

> not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment.

544 U.S. at 101.

That the passenger voluntarily provides information at the officer's request does not turn the encounter into a consensual one. Questioning alone does not constitute a seizure of a person, *Bostick*, 501 U.S. at 434, and it does not transform the initial seizure into a consensual encounter. When a police officer "orders one particular car to pull over," the officer "acts with an implicit claim of right based on fault of some sort." *Brendlin*, 127 S. Ct. at 2407. The moment a driver submits to an officer's show of authority and stops his car, the passenger has no discretion to terminate the encounter and go about his business. *See id.* Even when the only fault is the driving, the passenger's "attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place." *Id.*

The state court's conclusion that Officer Trevizo's encounter with Johnson became consensual was premised on Trevizo's subjective belief that, as far as she was concerned, Johnson "could have refused" her request to get out of the car. (Pet. App. A at 11, ¶ 21; J.A. 41.) But the inquiry is an objective one, not dependent on the particular officer's subjective beliefs. *Brendlin*, 127 S. Ct. at 2408-09. "The intent that

counts under the Fourth Amendment is the 'intent [that] has been conveyed to the person confronted.'" *Id.*, quoting *Michigan v. Chesternut*, 486 U.S. 567, 575 n.7 (1988). Generally, "a person has been 'seized' within the meaning of the Fourth Amendment if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.). In broader terms, the test probes the "coercive effect of the encounter" to ask whether a reasonable driver or passenger pulled over during a traffic infraction "would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 435-36.

Using an objective standard, *Delgado*, 466 U.S. at 215, a reasonable person in Johnson's situation would not believe he was free to leave. The gang task force deployed their vehicle's emergency lights to make the stop. Three officers dressed in tactical vests approached the vehicle, asked if anyone had weapons, ordered the occupants to display their hands, and ordered the driver to exit the car. (J.A. 12-15.) Johnson was in no position to "ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437.

Although Officer Trevizo stated that Johnson could have refused to get out of the car or be patted down, she never indicated to him he was free to leave, she never told him he did not have to answer her questions, and she never sought Johnson's permission to talk with him or pat him down. (J.A. 34-36, 45.)

Absent any objective indication from Trevizo that the detention had ended, Johnson had no reason to believe he was free to leave.

Moreover, merely getting out of the car in response to a request (rather than an order) from a police officer did not transform the seizure into a consensual encounter. Officer Trevizo explained that she asked Johnson to exit the car to speak with him away from the other passenger still in the car. (J.A. 20.) She was not releasing him or otherwise indicating his freedom to leave. Although Trevizo did not order Johnson out of the car, the coercive character of their encounter did not change because he exited the vehicle upon the officer's request.

The state court also cited the cooperative tone between Johnson and the officer and the absence of commands conveying to Johnson the fact that he was not free to leave. (Pet. App. A at 11-12, ¶ 22.) But an officer need not give explicit directives that a passenger is not free to leave during a traffic stop. *See Brendlin*, 127 S. Ct. at 2407. In addition, a civil and cooperative tone between the officer and passenger does not alter the fact that the passenger is seized at the time of the stop. In fact, it generally serves the officer's and the detainee's interests to maintain civilities during a traffic stop.

Officer Trevizo testified that her encounter with Johnson was "happening simultaneously" with Detective Machado's questioning of the driver. (J.A. 14.) Machado was dealing with the driver outside the car,

Detective Gittings was dealing with another passenger seated in the front seat, and Trevizo was talking to Johnson. (*Id.* at 31.) Officer Trevizo testified that Detective Machado and the driver "were behind me" during the time she spoke with Johnson. (*Id.* at 43.) Therefore, all of the interactions with Johnson, including the pat down, occurred while Johnson was seized as part of the traffic stop. The Arizona Court of Appeals erred in concluding otherwise.

2. An officer may, consistent with the Fourth Amendment, pat down a stopped passenger whom the officer reasonably believes is armed and dangerous even when the passenger is no longer seized.

Even if Johnson was no longer seized when the pat down occurred, the pat down satisfies constitutional requirements. *Terry* establishes the fundamental principle that a pat-down search must be reasonable. 392 U.S. at 19. Even if the seizure of Johnson ended when he got out of the vehicle at the request of Officer Trevizo, a pat-down search of Johnson under these circumstances was reasonable.

The Arizona court's two-judge majority agreed that based on *Brendlin*, Johnson was initially seized as a passenger. (Pet. App. A at 8-9, ¶ 16.) But it stated that this Court's holding in *Brendlin* failed to "inform[ ] us when a passenger seizure ends, or if and when it can become a new, separate, and unrelated encounter, or whether such an encounter may be

consensual." (*Id.* at 10, ¶ 18 n.3.) In the absence of guidance from *Brendlin* on "when a passenger seizure ends," the Arizona Court of Appeals borrowed from the analytically distinguishable line of cases addressing the suspect's consent to search for evidence. Presumably, the court did so because this analysis often turns on when the seizure ends. *See Bostick*, 501 U.S. at 434-36. This approach is flawed because it ignores the totality of the circumstances analysis necessary to determine the reasonableness of the pat down for officer safety.

Here, there is no question that Johnson was seized as a result of the traffic stop at least until the time he exited the vehicle, which was only moments before Officer Trevizo conducted the pat-down search. The pat down occurred in the context of a conversation between Trevizo and Johnson that began while he was seized as a result of the traffic stop. There is no evidence that the encounter between Trevizo and Johnson extended the duration of the traffic stop. Rather, it occurred while the driver and the other passenger were talking to the other officers.

Even assuming the seizure technically ended when Johnson exited the vehicle at Officer Trevizo's request, a pat-down search was reasonable.[3] An

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[3] Applying *Terry*'s principles, lower courts have upheld pat-down searches that were not even part of an investigative stop. *See, e.g., United States v. Orman*, 486 F.3d 1170, 1173 (9th Cir. 2007) (off-duty officer working in a mall lawfully lifted defendant's shirt and seized weapon during consensual encounter);

(Continued on following page)

assessment of the reasonableness of the pat down requires a balance of the occupant's "mere inconvenience . . . against legitimate concerns for the officer's safety." *See Mimms*, 434 U.S. at 111. When the initial encounter is lawful, as it was in this case, a reasonable fear for safety provides sufficient grounds to conduct a frisk under *Terry*. Even if, as the state court concluded below, the initial lawful seizure had "evolved" into a consensual encounter, the officers were entitled to stop the car carrying Johnson, and Officer Trevizo could conduct a pat down following the lawful stop based on her reasonable belief Johnson was armed and dangerous.

The state court's two-judge majority suggested that under the circumstances presented by the facts "[a]ny person, including a policeman, is at liberty to avoid a person he considers dangerous." (Pet. App. A at 8, ¶ 15) (citing *Terry*, 392 U.S. at 32 (Harlan, J., concurring)). But avoiding an armed person is frequently not an option when the police perform their duties. Officer Trevizo could not exclude Johnson from the investigative stop of the driver and thus

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United States v. Davis, 202 F.3d 1060, 1062 (8th Cir. 2000) (pat down valid where the stop was based on seeing two men attempting to open a locked door); *United States v. Flett*, 806 F.2d 823, 828 (8th Cir. 1986) (valid pat-down search of individual visiting the home of the subject of a separate arrest warrant); *Hicks v. State*, 631 A.2d 6, 10 (Del. 1993) (valid pat-down search of spectator at scene of traffic stop); *People v. Laube*, 397 N.W.2d 325, 328 (Mich. App. 1986) (valid pat down of hitchhiker who voluntarily stayed in the area, not subject to detention).

avoid contact with him. Also, requiring Officer Trevizo to retreat from a potentially armed and dangerous passenger would do nothing to address the potential hazard to the officers and the public. In this instance, if Trevizo had walked away, she would have left the two other officers present in the same danger. The facts of this case establish that Officer Trevizo conducted a reasonable pat-down search for weapons based on her reasonable belief that Johnson might be armed and might pose a risk to the safety of the officers.

There is no prohibition on conducting a pat-down search of a passenger during a traffic stop as long as the initial seizure is lawful and the officer reasonably believes the passenger is armed and dangerous. This case shows that no other requirements make sense if the sole purpose of a frisk is officer (and public) safety.

CONCLUSION

This Court should reverse the judgment of the Arizona Court of Appeals and hold that officer Trevizo's pat-down search of Johnson for weapons was reasonable under the Fourth Amendment.

Respectfully submitted,

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RESPONDENT'S BRIEF

109

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STATE OF ARIZONA,

Petitioner,

v.

LEMON MONTREA JOHNSON,

Respondent.

On Writ of Certiorari to the Court of Appeals of Arizona

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QUESTION PRESENTED

Whether an officer may conduct a protective search of a passenger in a car stopped for a minor traffic infraction even though the officer lacks reasonable suspicion that the individual is committing or has committed a crime and the search cannot be justified by the officer's need to take immediate command of the scene of the traffic stop, if the officer reasonably suspects that the individual might present a safety threat.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Arizona Court of Appeals (Pet. App. A1-A23) is reported at 170 P.3d 667. The Arizona Supreme Court's order denying review (Pet. App. B1-B2) and the opinion of the trial court (J.A. 73-77) are unreported.

JURISDICTION

The Arizona Supreme Court denied review on November 29, 2007. Pet. App. B1. A timely petition for a writ of certiorari was filed on Feb. 27, 2008, and was granted on June 23, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the Constitution of the United States reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

This Court has long recognized that the protections afforded by the Fourth Amendment allow police officers to act reasonably to protect themselves against the threats they encounter. In particular, the Court held in *Terry* v. *Ohio*, 392 U.S. 1 (1968), that an officer may subject an individual to a protective search for weapons if the facts known to the officer

justify a reasonable suspicion of criminal activity and a reasonable suspicion of a threat to safety. The Court also has recognized that officers are entitled to take "command over the situation" in which a permissible search or seizure is occurring. *E.g.*, *Michigan* v. *Summers*, 452 U.S. 692, 703 (1981). That principle carries limited authority to conduct protective searches when necessary to secure the scene so that officers may conduct a permissible motor vehicle stop.

The Arizona court recognized these principles, but held that they did not justify the officer's search of Mr. Johnson because of the particular factual circumstances of this case. The court determined, based on a detailed review of the facts, that the protective search of Mr. Johnson's person occurred in the course of an encounter between the police and Mr. Johnson that "was wholly unrelated to the stop and constituted a separate, and consensual, encounter." Pet. App. A12.

Confronted with this fact-bound determination, petitioner and its amici urge the Court to adopt a series of novel legal principles that would broadly authorize protective searches—of anyone engaged in any consensual encounter with a police officer or, alternatively, of any passenger in a vehicle stopped for a traffic violation—based solely on a reasonable suspicion of a threat to safety.

There is no warrant for such a dramatic diminution in the protection afforded by the Fourth Amendment with respect to intrusive searches of an individual's body. The concerns about officer safety emphasized by petitioner and its amici ignore the well-established principles enabling officers to act to protect themselves, principles that neither petitioner

nor its amici have shown to be inadequate. This Court should decline the invitation to use the occasion of a state court's fact-bound determination to revise dramatically Fourth Amendment jurisprudence regarding searches that touch on interests that are at the core of that constitutional protection.

A. Factual Background

On April 19, 2002, while on patrol in an unmarked vehicle, three law enforcement officers who were members of Arizona's gang task force patrolling near the Sugar Hill neighborhood of Tucson, stopped a vehicle because a license check had revealed that the registration had been suspended for an insurance-related reason, which is a civil violation under Arizona law. J.A. 7, 11-12, 29, 43-44. The stop took place at 9 p.m. on Stone Avenue, a major roadway in Tucson east of Sugar Hill that carries thousands of vehicles each day. J.A. 10-11, 30.

The officers had no reason to believe that the vehicle was involved in criminal activity, and they had received no reports of a crime committed nearby. J.A. 30, 32-33, 38-39. The civil traffic violation did not raise concerns about possible criminal behavior. J.A. 44.

Detective Machado approached the vehicle, made contact with the driver, asked the driver and two passengers to "put their hands where he can see them or put them on the front seat," and asked the driver to exit the vehicle. J.A. 14. He also asked "if there were any weapons in the vehicle, and all occupants said no." J.A. 15.

While Detective Machado was speaking with the driver,[1] Officer Trevizo initiated a conversation with respondent Lemon Johnson, a young black male who was sitting in the back seat of the vehicle. J.A. 15; Record on Appeal 7. She asked Mr. Johnson for identification; he responded that he did not have identification, but told Officer Trevizo his correct name and date of birth. J.A. 15, 19, 31. In response to further questioning, Mr. Johnson volunteered that he was from Eloy, Arizona, and that he had served time in prison for burglary. J.A. 19.

Officer Trevizo noticed that Mr. Johnson had in his pocket a scanner for listening to police calls. She testified that possession of a scanner is not illegal and that there are "plenty of people that like to listen to scanners," but stated that it was "out of the ordinary" to carry a scanner. J.A. 17. She did not observe whether the scanner was turned on. J.A. 31.

When Officer Trevizo initially observed Mr. Johnson, at the time the officers turned on their lights to stop the vehicle, she was concerned that he looked out the rear window at the officers while they approached the stopped vehicle, conduct that she deemed unusual. J.A. 12. But she found him to be "cooperative" in answering her questions and had no reason to believe he was engaged in criminal activity. J.A. 29, 39, 45.

Officer Trevizo believed that Mr. Johnson might have been a gang member because he was wearing blue, a color associated with the "Crips," a gang asso-

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[1] Officer Trevizo testified that she did not overhear any of the conversation between Detective Machado and the driver. J.A. 43.

ciated with a neighborhood near the location of the traffic stop—notwithstanding the fact that the driver was wearing red, a color linked to a rival gang—and because he had said he was from Eloy, a town that had a Crips-affiliated gang. J.A. 17-19, 27. She stated that "gang members, will often, in general, possess firearms," but did not testify specifically about members of the Crips gang. J.A. 10.

The officer "wanted to gather intelligence about the gang he might be in. * * * So I wanted to speak with him away from the other occupant that was still remaining inside the vehicle." J.A. 19; see also J.A. 20, 33. Officer Trevizo acknowledged that her questioning was not related to the purpose of the vehicle stop. J.A. 19-20, 26.

Officer Trevizo accordingly asked Mr. Johnson to exit the vehicle. J.A. 19-20, 33. She testified that Mr. Johnson "certainly" could have refused to get out of the car and that she was not planning to detain him. J.A. 41-42. She also stated that she had not provided him with *Miranda* warnings because "it was not an in-custody situation." J.A. 45.

When Mr. Johnson exited the car, Officer Trevizo directed him to turn around and told him that she was going to search him for weapons. She did not ask his permission to do so. J.A. 23, 33-36. During the initial search, she found a gun; a subsequent search of Mr. Johnson revealed marijuana. J.A. 24, 35; Pet. App. A5.

Mr. Johnson "left the vehicle in a normal manner," making no swift or furtive movements. Pet. App. A5; see also J.A. 33. Officer Trevizo "did not tell Johnson she planned to pat him down before he got out of the vehicle but 'made the decision' when he ex-

ited the vehicle." Pet. App. A5; see also J.A. 23. She stated that she "patted him down for officer safety," because she believed he might be in possession of a weapon because of his lack of identification, his possession of the scanner, her suspicion of his possible gang affiliation, his criminal record, and the fact that he watched the officers as they approached the vehicle. J.A. 20-21.

B. Decisions Below

Johnson was charged with possession of a weapon and possession of marijuana. He moved to suppress the evidence found in Officer Trevizo's search on two grounds. He argued that Officer Trevizo had no authority to conduct the protective search both because she lacked reasonable suspicion of criminal activity and because the facts did not support a reasonable belief that Mr. Johnson was armed and dangerous. J.A. 57-58; Motion to Suppress filed Oct. 31, 2005, at 5-6.

The trial court denied the suppression motion. J.A.73-77. It held that "under the circumstances there was a reasonable basis to believe there was a danger, and a stop allowed them to go ahead and do the pat down." *Id.* at 77.

The court determined that "[w]hat we basically have here is a legitimate stop for what turns out to be a civil matter." J.A. 75. It concluded that there were several factors "that the police officer knew and was concerned about and increased the safety kind of issue." *Ibid.* These included the car stop, "the gang colors and this officer knowing about the gang kinds of situations," the fact that Johnson was from Eloy, his possession of the scanner, lack of identification, and prior incarceration. J.A. 76.

Johnson subsequently was convicted at trial on the two possession charges.[2]

The court of appeals reversed by a divided vote, holding that the search violated the Fourth Amendment because it occurred during a consensual encounter and was not supported by a reasonable suspicion of criminal activity. Pet. App. A1-A23.

The court held that "[a]n officer may not * * * conduct a pat-down search during a consensual encounter if the officer lacks reasonable suspicion that criminal activity is occurring, even if the officer has reason to suspect that a suspect may be armed and dangerous." Pet. App. A6. The court pointed to the fact that "a person is allowed to disregard or flee from a consensual encounter with law enforcement officers," stating that "it would be inconsistent with this idea if the 'officer possesse[d] the authority to require the target of the consensual inquiry to submit to a pat-down search.'" *Id.* at A7, A8.

The court below also quoted Justice Harlan's concurring opinion in *Terry*, stating that "'[a]ny person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence.'" Pet. App. A8 (quoting 392 U.S. at 32-33).

The court of appeals first addressed the question whether Johnson was lawfully seized at the time of the pat-down search. Relying on this Court's decision in *Brendlin* v. *California*, 127 S.Ct. 2400 (2007),

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[2] Johnson was acquitted of a charge of resisting arrest. Pet App. A5.

holding that a passenger is seized when the vehicle in which he is riding is lawfully stopped by the police, the court determined that "Johnson was seized when the officers stopped the car." Pet. App. A9.

Recognizing that a seizure during a traffic stop may "evolve into a consensual encounter," the court stated that

> common sense suggests that at some point during the encounter the passengers in the vehicle must be free to leave—their fate is not entirely tied to that of the driver. Obviously, if a driver is arrested and taken to the police station, innocent passengers will not also be taken into custody or required to accompany the driver. If the passengers are told they are free to leave and do so, it is clear they are no longer seized; it is equally clear that, if they are being questioned about the reason for the stop, they remain seized. It is less clear when passengers' seizures terminate under factual situations that lie within the extremes of these examples, but we must be guided by reasonableness.

Pet. App. A9, A10. "'Whether a person has been seized by police is a mixed question of law and fact.'" *Id.* at A11 (citation omitted).

Examining the facts of this case, the court determined that the "initial lawful seizure of Johnson incident to the traffic stop of the driver evolved into a separate, consensual encounter stemming from an unrelated investigation by Trevizo of Johnson's possible gang affiliation and that, under the circumstances of this case, a reasonable person in Johnson's position would have felt free to remain in the vehi-

cle." Pet. App. A14. It determined that "[n]one of Trevizo's verbal or nonverbal communications with Johnson before the pat down can reasonably be construed to have conveyed to him that his encounter was anything other than consensual." *Id.* at A12; see also *id.* at A11 (noting that Officer Trevizo "conceded that, as far as she was concerned, Johnson 'certainly' 'could have refused' her request to get out of the car").

The court held that the suppression motion should have been granted, because "when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purposes of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger without reasonable cause to believe 'criminal activity may be afoot.'" Pet. App. A15, A16 (quoting *Terry*, 392 U.S. at 30).

The court emphasized the narrowness of its holding, making clear that it did not reach "the broader question * * * whether officers, in the interests of their own safety, and based solely on the seizure resulting from the initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous. Had the officers immediately ordered Johnson out of the vehicle and conducted a pat-down search for the purpose of assuring their safety during the stop of the driver, that question would be presented." Pet. App. A15.

Judge Espinosa dissented. He concluded that the encounter between Officer Trevizo and Johnson was not consensual and that the officer's belief that Johnson was dangerous permitted the pat down. Pet. App. A21, A22.

SUMMARY OF ARGUMENT

The issue in this case is whether the Court should revise existing principles addressing the balance under the Fourth Amendment of two important interests—enabling law enforcement officers to protect themselves against the threats they face in the course of their duties and protecting citizens against unjustified "serious intrusion[s] on the sanctity of the person" (*Terry*, 392 U.S. at 17) through searches to discover whether an individual has a weapon concealed on his or her body. Arguing that existing standards give police officers insufficient authority to protect themselves, petitioner and its amici advance new principles more broadly permitting these searches.

The Court addressed this issue in *Terry*, holding that an officer may conduct a protective search if he is aware of facts "which lead[] him reasonably to conclude in light of his experience that criminal activity may be afoot *and* that the persons with whom he is dealing may be armed and presently dangerous." *Terry*, 392 U.S. at 30 (emphasis added). More recently, the Court has recognized that law enforcement officers may exercise authority over individuals in order to obtain "command of the situation" where a permissible search or seizure is occurring. *Michigan* v. *Summers*, 452 U.S. 692, 703 (1981). This established principle allows protective searches necessary to secure the scene of a lawful traffic stop based on a reasonable suspicion that a passenger is armed and dangerous.

Petitioner and its amici point out that law enforcement officers face significant risks, especially in the context of vehicle stops. But they never explain why these existing principles are not sufficient to en-

able officers to protect themselves. Indeed, the facts of the lower court cases on which petitioner and the amici rely make clear that the protective searches challenged in those cases would be upheld under these existing principles. See pages 21-22 & note 6, *infra*.

The series of new standards proposed by petitioner and the amici, moreover, would effect a very substantial reduction in the protection afforded to privacy interests at the core of the Fourth Amendment. *First*, they argue that an officer engaged in any interaction with a citizen—even a casual conversation with a pedestrian on the street—may perform a weapons search based solely on reasonable suspicion that the individual is a threat to safety. The Solicitor General claims that this standard is authorized by *Terry* itself, but a review of that decision leads to the unsurprising conclusion that the *Terry* Court meant what it said: both reasonable suspicion of criminal activity and reasonable suspicion of a threat to safety are required for a valid protective search. The Court's descriptions of *Terry* in subsequent opinions confirm that conclusion.

Neither is there any basis for revising the standard adopted in *Terry*. None of this Court's Fourth Amendment precedents provide grounds for eliminating the requirement of reasonable suspicion of criminal activity as a predicate for protective searches in consensual encounters. More fundamentally, the balance between the relevant Fourth Amendment interests does not support that approach. The interest in protecting officer safety is substantial, but it also is addressed by existing standards permitting protective searches; there is little evidence that incremental authority is needed. And

the interest in preventing unjustified protective searches is substantial, because of their very significant intrusion on an individual's privacy interests.

Second, petitioner and its amici urge the Court to adopt a rule permitting protective searches of a passenger on reasonable suspicion of a threat to safety for the entire duration of every vehicle stop. But the Court consistently has refused to adopt such across-the-board standards. Holding that "the 'touchstone of the Fourth Amendment is reasonableness,'" the Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996). That same approach is appropriate here.

Under *Summers* and its progeny, officers may subject a vehicle passenger to a protective search on reasonable suspicion of a threat to safety in connection with the officers' need to secure the scene of the search. The latter requirement necessitates a fact-specific inquiry, because vehicle stops arise in numerous contexts—the officers' need to control vehicle passengers will differ depending upon whether the stop occurs in the downtown area of a city or on an interstate highway—and the facts regarding the officers' interaction with the passengers will vary in every case.

An across-the-board rule would expand significantly the extent to which passengers not suspected of any criminal activity may be subjected to these searches, without any demonstration that this additional authority is needed to protect officer safety. After all, even when the *Summers* rationale does not apply, officers still may conduct such searches under *Terry*. The result of the broad new rule that peti-

tioner seeks will be the use of the protective search rationale in the context of investigations of unrelated activity—precisely what the Arizona court found occurred here.

Petitioner and its amici also invoke this Court's decision in *Brendlin*, arguing that a passenger is seized for the entire duration of a vehicle stop and that a protective search therefore may be based solely on suspicion of a threat to safety. *Brendlin* found the passenger seized at the outset of the vehicle stop; it did not hold that a passenger necessarily is seized for the entire stop, no matter how long it lasts and no matter what the circumstances. Indeed, by applying the general standard set forth in *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980), for determining whether an encounter is consensual, the *Brendlin* Court recognized that question turns upon the facts of the particular stop. Again, there is no justification for replacing the Fourth Amendment's general fact-based standard with an across-the-board rule that will as a practical matter open the door to intrusive searches based on a significantly reduced factual justification.

The Arizona court below applied this Court's precedents, closely analyzed the factual record, and concluded that the interaction between Officer Trevizo and Mr. Johnson "was wholly unrelated to the stop and constituted a separate, and consensual, encounter." Pet. App. A12. There is no basis for reconsideration of that fact-bound determination by this Court.

Even if the Court concludes, contrary to our submission, that the search here may be upheld if the officer had only a reasonable suspicion that Mr. Johnson was armed and dangerous, the judgment of

the court of appeals should not be reversed because the facts here do not satisfy that standard. The Court should remand the case to allow the Arizona court to address in the first instance the sufficiency of the facts.

Moreover, the facts are plainly insufficient to satisfy that standard. Officer Trevizo did not cite any of the factors that courts typically rely upon to establish a reasonable suspicion of a sufficient threat to safety. Rather, she invoked generic observations that could apply to a very substantial number of unarmed individuals and therefore do not provide a sufficiently focused level of suspicion to uphold these intrusive searches under the Fourth Amendment.

ARGUMENT

THE SEARCH OF MR. JOHNSON VIOLATED THE FOURTH AMENDMENT.

Petitioner and its amici attempt to frame their position as a routine application of this Court's decisions, but they actually seek an unprecedented reduction in the protection afforded by the Fourth Amendment. Put simply, they contend that the police may search anyone with whom they interact—even a pedestrian engaged by an officer in an entirely consensual encounter—based on a reasonable suspicion that the individual may be armed and dangerous.

Thus, the Solicitor General asserts (Br. 7) that a protective search should be permissible "whenever an individual chooses * * * to remain in the presence of an officer, in a place where the officer has the lawful right to be"—a test that would permit these searches in any public place at any time. And if the individual sought to avoid search by leaving the presence of the police, that "flight" would be used to

justify a search under the *Terry* standard. The practical effect would be to expand dramatically the power to undertake searches of individuals' persons.

This Court has never upheld such a search on the basis of the minimalist standard urged by petitioner and its amici. To the contrary, this Court's precedents, beginning with *Terry*, recognize that a protective search is a "serious intrusion on the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." 392 U.S. at 17.

The Court accordingly has required two factual predicates for an officer's protective search to comport with the Fourth Amendment: the officer must be aware of facts "which lead[] him reasonably to conclude in light of his experience that criminal activity may be afoot *and* that the persons with whom he is dealing may be armed and presently dangerous." *Terry*, 392 U.S. at 30 (emphasis added); accord *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972).

Both elements have been present in each of the cases in which this Court has upheld a protective search. *Adams*, 407 U.S. at 147; *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam). See also *Michigan* v. *Long*, 463 U.S. 1032 (1983) (suspicion of driving while intoxicated); *United States* v. *Robinson*, 414 U.S. 218 (1973) (search incident to arrest).

Dispensing with the requirement that the officer reasonably suspect that "criminal activity may be afoot" for all encounters between officers and the public—as petitioner and its amici urge—would dramatically reduce the protection afforded by the Fourth Amendment. Because an officer may ap-

proach anyone to initiate a consensual encounter, and courts may be reluctant to second-guess an officer's conclusion that she reasonably believed an individual to be armed and dangerous even when the factual basis for that belief is weak, the practical effect of petitioner's new rule would be to empower officers to target individuals for search based on "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27. In other words, to authorize the random searches that the framers of the Fourth Amendment sought specifically to prohibit.

We first explain that this dramatic constriction of Fourth Amendment protection cannot be justified by the need to protect officer safety, because well-established principles already address that concern. Next, we demonstrate that in the context of a consensual encounter, a search for weapons is permissible only when *Terry*'s standard is satisfied—the officer must reasonably suspect that the individual is engaging in or has engaged in criminal activity and that the individual is armed and dangerous. Because Officer Trevizo and Mr. Johnson were engaged in a consensual encounter at the time of the search at issue here, and Officer Trevizo could not exercise control over Mr. Johnson, that standard applies in assessing the search under the Fourth Amendment.

A. Settled Fourth Amendment Principles Allow Officers Broad Leeway To Protect Themselves Against Attacks By Individuals With Whom They Interact.

Every member of society has a strong interest in ensuring that the law enforcement officers who protect us may take all reasonable and appropriate steps to protect themselves from harm as they go about their duties. "[I]t would be unreasonable to re-

quire that police officers take unnecessary risks in the performance of their duties." *Terry*, 392 U.S. at 23; accord, *Adams*, 407 U.S. at 146.

To vindicate this important interest, long-established Fourth Amendment principles recognize law enforcement officers' broad authority to conduct protective searches.[3]

First, the Court's holding in *Terry* permits protective searches in the overwhelming majority of situations in which an officer is threatened with harm. If facts known to the officer truly justify a reasonable belief that the individual is armed and dangerous, those same facts will in the vast majority of cases also justify a reasonable belief that "criminal activity is afoot." That is because when "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger" (*Terry*, 392 U.S. at 27), he virtually always would also be justified in believing that the individual was engaging in criminal activity.

Indeed, threatening harm to law enforcement personnel or to the public constitutes a crime in virtually every jurisdiction. *E.g.*, Cal. Penal Code §§ 69 & 422 (threats of violence and threats interfering with law enforcement officers); N.J. Stat. Ann. § 2C:12-1(a)(3) & § 2C:12-1(b)(5)(a) (menacing); N.Y.

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[3] The Court also has recognized that the Fourth Amendment permits law enforcement officers to take other steps to address threats to public safety. See, *e.g.*, *Scott* v. *Harris*, 127 S.Ct. 1769 (2007) (measures taken to stop suspect's reckless driving); *Brigham City* v. *Stuart*, 547 U.S. 398 (2006) (warrantless entry of home justified by observations of ongoing violence inside); *New York* v. *Quarles*, 467 U.S. 649 (1984) (establishing public safety exception to *Miranda* requirement).

Penal Law §§ 120.15 & 120.18 (placing or attempting to place police officer or placing another person in reasonable fear of physical injury); Ohio Rev. Code Ann. § 2903.22 (causing another to believe the offender will cause physical harm to the person); Tex. Penal Code Ann. § 22.01(a)(2) (intentional or knowing threat of imminent bodily injury). A reasonable suspicion that an individual is both armed and dangerous to an officer or the public therefore will in many cases be sufficient to establish a reasonable suspicion of criminal activity. *E.g.*, *United States* v. *Hartz*, 458 F.3d 1011, 1018 (9th Cir. 2006).

The converse is also true: the facts indicating that criminal activity is afoot often will support a reasonable belief that a suspect is armed and dangerous. See, *e.g.*, *Terry*, 392 U.S. at 28 (reasonable officer safety concerns premised solely on reasonable suspicion that suspect was casing store for armed robbery); *United States* v. *Bullock*, 510 F.3d 342, 346 (D.C. Cir. 2007) (reasonable suspicion of any "violent or serious crime" supports inference that "the suspect 'may be armed and presently dangerous'"), cert. denied, 128 S.Ct. 2095 (2008); *United States* v. *Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998) (protective search permissible when officer has reasonable suspicion that illegal drugs are present in stopped vehicle because "guns often accompany drugs"); *United States* v. *Salas*, 879 F.2d 530, 535 (9th Cir. 1989) (same); *United States* v. *Oates*, 560 F.2d 45, 62 (2d Cir. 1977) ("[T]he belief of the police officer that the suspect may be armed and dangerous can be predicated on the nature of the criminal activity involved."); *People* v. *Franklin*, 217 Cal. Rptr. 529, 534-535 (Cal. Ct. App. 1985) (protective search justified after traffic

stop on the basis of reasonable suspicion that occupants were perpetrators of recent armed robbery).[4]

Second, the Court has recognized in several contexts that law enforcement officers may exercise authority over individuals in order to obtain "command of the situation" where a permissible search or seizure is occurring. *Summers*, 452 U.S. at 703. The question in *Summers* was whether officers could detain an individual leaving a house as they arrived to execute a warrant there. The Court pointed out that the execution of a warrant "is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence" and that the risk of harm would be "minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-703.

In upholding the seizure, the Court emphasized that

> [a] neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there. The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself.

Summers, 452 U.S. at 701; see also *Muehler* v. *Mena*, 544 U.S. 93, 98-99 (2005) (upholding detention of oc-

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[4] In addition, of course, an officer may conduct a search incident to arrest when she has probable cause to arrest an individual. *Virginia* v. *Moore*, 128 S. Ct. 1598, 1607 (2008); *United States* v. *Robinson*, 414 U.S. 218, 234-235 (1973).

cupants of premises being searched pursuant to a warrant as well as "use of reasonable force to effectuate the detention").

Law enforcement officers' authority to exercise control over individuals found in a house being searched carries with it the ability to protect themselves against such individuals. The Court made clear in *Los Angeles County* v. *Rettele*, 127 S. Ct. 1989, 1992-1993 (2007) (per curiam), that officers executing a search warrant may perform a protective search of an individual found in the location named in the warrant if the officers have reasonable suspicion that the individual may be armed and dangerous.

The Court relied on *Summers*' analysis in *Maryland* v. *Wilson*, 519 U.S. 408, 414-415 (1997), holding that a police officer at the outset of a vehicle stop could order passengers out of the car in order to take "command of the situation" and minimize the risks of violence or injury to the officers as well as to the passengers.

The lower courts have extended *Wilson*, holding that at the point that *Wilson* permits an officer to exercise control over vehicle passengers, the officer may conduct a weapons search based on reasonable suspicion that a passenger is armed and dangerous. See, *e.g.*, *United States* v. *Moorefield*, 111 F.3d 10, 13 (3d Cir. 1997) (officers acted at the outset to secure the scene); see also page 22 & note 6, *infra* (citing cases).[5]

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[5] This Court appeared to recognize this authority in dicta in its opinion in *Knowles* v. *Iowa*, 525 U.S. 113 (1998). See page 42, *infra*.

Law enforcement officers' authority under *Summers* and *Wilson* to exercise control over individuals in order to take "command of the situation" does not last indefinitely. The Court's decisions make clear that the duration of the officer's authority turns upon the underlying purpose. "[A] seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Illinois* v. *Caballes*, 543 U.S. 405, 407 (2005). In *Caballes*, which involved a traffic stop for speeding, the Court observed that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Ibid.*; cf. *United States* v. *Sharpe*, 470 U.S. 675, 686-687 (1985) (length of permissible investigative stop determined by objective reasonableness of officer's investigatory conduct).

In the context of execution of a search warrant, as in *Summers*, the officers may detain an individual for the duration of the search because the detention is related to effectuation of the search authorized by an independent magistrate, including enabling officers to obtain access to the places authorized to be searched. 452 U.S. at 702-703; *Muehler*, 544 at 99 n.2.

Officers' authority over passengers during a vehicle stop stems from the interest in enabling them to secure the scene so that they may engage in their investigatory activities. *Wilson*, 519 U.S. at 414-415. Once that is accomplished, the officers' authority to control these individuals expires. That is why the decisions cited by petitioner (Br. 14-15 n.2 & 22-23 n.3) and its amici (*e.g.*, U.S. Am. Br. 13-14 n.4) upholding

protective searches of passengers on this basis virtually all involve searches that occurred in the context of law enforcement officers' efforts to secure the scene.[6]

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[6] *E.g.*, *United States* v. *Soares*, 521 F.3d 117, 118-119 (1st Cir. 2008) (from the commencement of the stop, individual was agitated and verbally abuse and impeded officers' control of the scene); *United States* v. *Moorefield*, 111 F.3d 10, 13 (3d Cir. 1997) (officers acted at the outset to secure the scene); *United States* v. *Colin*, 928 F.2d 676 (5th Cir. 1991) (same); *United States* v. *Fryer*, 974 F.2d 813 (7th Cir. 1982) (same).

In many cases, the facts plainly supported reasonable suspicion of criminal activity, so the protective search would have been upheld under the *Terry* standard even if it were insufficiently related to the interest in securing the scene. *United States* v. *Hernandez-Rivas*, 348 F.3d 595, 599 (7th Cir. 2003) (officers had information that the passenger owned a firearm and was participating in cocaine trafficking); see also *United States* v. *Rice*, 483 F.3d 1079, 1084 (10th Cir. 2007) (car's movements indicated preparation for burglary or drive-by shooting; officers knew that passenger was armed and dangerous); *Holeman* v. *City of New London*, 425 F.3d 184, 192 (2d Cir. 2005) (convicted narcotics felon acting suspiciously in high crime neighborhood); *United States* v. *Montgomery*, 377 F.3d 582 (6th Cir. 2004) (officers saw illegal drugs in the car), cert. denied, 543 U.S. 1167 (2005); *United States* v. *Woodall*, 938 F.2d 834, 837 (8th Cir. 1991) (officer recognized passenger as an associate of the driver, who the officer had arrested for a drug violation a few weeks earlier, and as a suspected manufacturer of controlled substances). See also *United States* v. *Davis*, 202 F.3d 1060, 1062 (8th Cir. 2000) (requiring proof of suspicion of criminal activity: "to be constitutionally reasonable, a protective frisk must also be based upon reasonable suspicion that criminal activity is afoot").

Still other cases are inapposite because they involve officers securing the scene to enable execution of an arrest warrant, a situation analogous to execution of the search warrant in *Summers*. *E.g.*, *United States* v. *Flett*, 806 F.2d 823 (8th Cir. 1986); *United States* v. *Vaughan*, 718 F.2d 332 (9th Cir. 1983);

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This case does not involve either of the typical factual situations involving protective searches just discussed. The State did not attempt to argue below that the relevant facts established a reasonable suspicion of criminal activity, and sought instead to justify the search solely by reference to the alleged reasonable suspicion that Mr. Johnson posed a threat to Officer Trevizo's safety. Pet. Br. 2. Given the close relationship between the two standards, the State's position casts doubt on the sufficiency of the facts to establish a reasonable suspicion of a threat to officer safety.

In addition, the State is faced with the finding by the court below that Mr. Johnson was no longer under the officer's control at the time the search took place. See pages 8-9, *supra*. It therefore must argue that a weapons search during a consensual encounter is subject to the same standard as one occurring in the course of a seizure.

There is no evidence that these unusual facts arise with any frequency. Certainly neither the certiorari petition nor the merits briefs filed by petitioner and its amici demonstrate that there are (1) a significant number of cases in which the prosecution concedes that the relevant facts suffice only to establish reasonable suspicion of a threat to officer safety; or (2) a substantial number of cases in which the lower court has held a search impermissible because the officer lacked authority to exercise control over the individual. See page 22 note 6, *supra*.

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see also *United States* v. *Dennison*, 410 F.3d 1203 (10th Cir.) (vehicle search), cert. denied, 546 U.S. 955 (2005).

Notwithstanding the absence of any indication of a gap in police officers' ability to protect themselves under settled Fourth Amendment principles, petitioner and its amici urge this Court to address the atypical facts presented here by adopting a significant new Fourth Amendment rule applicable to consensual encounters, with broad ramifications for privacy protection in a variety of contexts.

There is no justification for this dramatic change in Fourth Amendment jurisprudence. Indeed, the references of petitioner's amici to the need to protect officer safety ignore the existing principles allowing officers to exercise very broad authority to protect themselves.[7]

We next explain why petitioner and its amici are wrong in asserting that even if the encounter were consensual, the search would be permissible if the officer reasonably believed that Mr. Johnson was armed and dangerous. Rather, the legal standard governing the permissibility of the search depends upon whether the officer had the authority to control Mr. Johnson's movements at the time of the search.

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[7] As we explain below (at 34-48), the arguments advanced by petitioner and its amici turn upon whether Officer Trevizo could seize Mr. Johnson, either under the principle recognized in *Summers* and *Wilson* or under this Court's decision in *Brendlin* v. *California*, 127 S.Ct. 2400 (2007). It is not at all clear that the question presented in the certiorari petition—which says nothing about either issue—brings before this Court the Arizona court's factual determination that Officer Trevizo lacked this authority.

B. A Protective Search During A Consensual Encounter Must Be Justified By A Reasonable Suspicion Of Criminal Activity As Well As A Reasonable Belief That The Suspect Is Armed And Dangerous.

An officer "is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so." *Sibron* v. *New York*, 392 U.S. 40, 64 (1968).

The Fourth Amendment generally permits law enforcement authorities to search an individual's person only when the facts known to the officers constitute probable cause to arrest the individual. *Ybarra* v. *Illinois*, 444 U.S. 85, 93 (1979). That is because the intrusion on the privacy interests protected by the Fourth Amendment is very substantial—"a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons" that is typically "performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised." *Terry*, 392 U.S. at 16-17; see also pages 32-33, *infra*.

The exceptions to this general rule endorsed by this Court have been narrowly tailored to permit protective searches only in very specific situations in which there is a significant threat to the safety of law enforcement officers or the public at large. See pages 16-22, *supra*.

Petitioner and its amici argue for an extremely broad approach—that all that is required to justify

any protective search in any context is a reasonable suspicion of a threat to officer safety. Although they focus on the motor vehicle context, the legal principle they advocate would encompass all consensual encounters, including an officer's voluntary on-the-street interactions with pedestrians.[8] Such a standard is inconsistent with this Court's precedents and with the principles embodied in the Fourth Amendment.

1. Terry *makes clear that reasonable suspicion of a threat to officer safety by itself is not sufficient to justify a protective search during a consensual encounter.*

This Court's decision in *Terry* holds that a reasonable suspicion of a threat to officer safety is not by itself sufficient to justify a protective search. The Court expressly determined that in order to conduct a protective search of an individual approached on the street, the officer must have *both* a reasonable suspicion of criminal activity *and* a reasonable suspicion of a threat to officer safety. 392 U.S. at 30. Under petitioner's approach, *Terry* should have been decided differently—the officer could have approached Mr. Terry, asked him a question, and then immediately searched him based only on reasonable suspicion of a threat to safety.

The two elements of the *Terry* standard reflect the two separate intrusions on Fourth Amendment interests that inevitably occur during a protective search. First, the individual is seized; he is under the

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[8] Indeed, petitioner relies (Br. 22-23 n.3) on decisions involving pedestrians to justify its position.

control of the officer during the time the search is conducted and deprived of "his freedom to walk away." *Terry*, 392 U.S. at 16. Second, the individual's right to prevent his person from being touched by others is intruded upon to a significant degree. See pages 32-33, *supra*. As the Court observed in *Terry*, "Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing." 392 U.S. at 19.

To be sure, an individual may consent to a protective search. But a person's willingness to engage in a consensual encounter, standing on the street and answering an officer's questions—an encounter that the individual is free to terminate at any time—does not constitute consent to a seizure of his person by the officer for the purpose of conducting a protective search. Cf. *Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents."). In the absence of consent *to the protective search*, therefore, the *Terry* standard must be satisfied in order to justify the protective search.

Justice Harlan specifically addressed this issue in his concurring opinion, confirming that an officer's ability to conduct a protective search did not extend to consensual encounters, but rather applied only when the officer had a right to seize the individual and prevent him from leaving during the protective search:

> [I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. * * * If and when a policeman

> has a right * * * to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection.

Terry, 392 U.S. at 32-33 (Harlan, J., concurring).

The Solicitor General proposes a revisionist interpretation of *Terry*, contending (Br. 17) that the Court actually decided two discrete issues—when an officer may detain an individual for investigatory purposes and when the officer may perform a protective search. As we have discussed, however, that assertion bears no relation whatever to the *Terry* Court's analysis, which makes clear that it was addressing the two intrusions on Fourth Amendment interests resulting from the protective search at issue in that case: the seizure of the individual and the search of his or her person. See also *Terry*, 392 U.S. at 10 (describing case as addressing "the power of the police to 'stop and frisk'").

Indeed, the *Terry* Court specified that its decision addressed the permissibility of the seizure only as it related to the protective search, stating that it decided "nothing * * * concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation. * * * We cannot tell with any certainty * * * whether any such 'seizure' took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons * * *."

392 U.S. at 19 n.16. The Solicitor General is thus incorrect in asserting that *Terry* addressed the seizure issue independently of the protective search.

Finally, this Court has repeatedly stated that *Terry*'s authorization of a protective search applies in circumstances in which police officers may detain the individual on the basis of reasonable suspicion of criminal activity. *United States* v. *Place*, 462 U.S. 696, 702 n.4 (1983) (endorsing Justice Harlan's conclusion in *Terry* that "'the right to frisk * * * depends upon the reasonableness of a forcible stop to investigate a suspected crime'"); see also *Florida* v. *J.L.*, 529 U.S. 266, 272, 274 (2000); *Adams*, 407 U.S. at 146.[9] It simply is not possible to construe *Terry* to permit protective searches in connection with consensual encounters based on a lesser showing.[10]

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[9] The Solicitor General suggests (Br. 20-21) that the statements in each of these opinions are dicta because none of them involved a consensual encounter. But the critical fact is that the Court has read *Terry*'s authorization of protective searches to apply only in the context of forcible detention. His reliance (Br. 18) on *Ybarra* v. *Illinois*, *supra*, is wholly misplaced. In holding invalid under the Fourth Amendment the search at issue in that case, the *Ybarra* Court stated that *Terry* "created an exception to the requirement of probable cause, an exception whose 'narrow scope' th[e] Court 'has been careful to maintain,'" and rejected the contention that the Fourth Amendment authorizes a generalized search for weapons. 444 U.S. at 93-94.

[10] The lower courts generally have determined that even in the context of searches following a consensual encounter both prongs of the *Terry* standard must be satisfied in order to uphold a protective search. See, *e.g.*, *United States* v. *McKoy*, 428 F.3d 38, 39 (1st Cir. 2005) ("It is insufficient that the stop itself is valid; there must be a separate analysis of whether the standard for pat-frisks has been met."); *United States* v. *Hunter*, 291 F.3d 1302, 1307 (11th Cir. 2002); *United States* v. *Burton*, 228

2. *The Solicitor General's expansive—and novel—protective search principle is squarely inconsistent with this Court's decisions.*

Piecing together quotes from several of this Court's opinions, the Solicitor General also argues (Br. 18-21) that the Court has recognized a general principle that officers may conduct a protective search whenever they have a reasonable suspicion that an individual is armed and dangerous. No decision of this Court so holds, and the Solicitor General's proposed rule is starkly inconsistent with this Court's Fourth Amendment jurisprudence.

The decisions on which the Solicitor General relies—*Maryland* v. *Buie*, 494 U.S. 325 (1990), *Maryland* v. *Wilson*, *supra*, and *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (per curiam)—involve situations in which police officers, by virtue of their execution of a warrant or permissible stop of a vehicle, may, as the Court put it in *Summers*, exercise "unquestioned

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F.3d 524, 527-528 (4th Cir. 2000) ("an officer may not conduct this protective search for purposes of safety until he has a reasonable suspicion that supports the investigatory stop * * *"); *United States* v. *Gray*, 213 F.3d 998, 1000 (8th Cir. 2000) (applying *Terry* standard); *United* States v. *Ubiles*, 224 F.3d 213, 217-218 (3d Cir. 2000) ("[N]or does a mere allegation that a suspect possesses a firearm, as dangerous as firearms may be, justify an officer in stopping a suspect absent the reasonable suspicion required by *Terry* * * *."). The Solicitor General (Br. 17) points to the Ninth Circuit's decision in *United States* v. *Orman*, 486 F.3d 1170 (9th Cir. 2007), cert. denied, 128 S.Ct. 1868 (2008), but *Orman* is an outlier. The second Ninth Circuit decision cited by the Solicitor General—*United States* v. *Flippin*, 924 F.2d 163 (1991)—involved the seizure of a bag, not a protective search.

command of the situation." 452 U.S. at 703; see also pages 19-22, *supra*.

Neither *Buie* nor *Wilson* even involved protective searches of an individual. *Buie* held that in connection with the execution of an arrest warrant, the officer could conduct a "cursory visual inspection of those places in which a person might be hiding" (494 U.S. at 327); and *Wilson* involved the authority to order a passenger out of a car. These decisions provide no support for the proposition that a protective search in the context of a wholly consensual encounter may be based upon a reasonable suspicion of a threat to officer safety.

The question in *Mimms* was whether an officer may order the driver of a stopped vehicle to get out of the car. The Court in *Mimms* specifically recognized that "[i]n this case, unlike *Terry v. Ohio*, there is no question about the propriety of the initial restrictions on [the individual's] freedom of movement" because he had been driving a car with expired license tags in violation of state law. 434 U.S. at 109. It concluded that the incremental intrusion on Fourth Amendment interests resulting from the order to exit the car was justified by the risk to police officers conducting traffic stops.

It is true that the individual in *Mimms* was subjected to a protective search after he exited the car. But the State did not argue that the protective search was justified solely by reasonable suspicion that the individual was armed and dangerous. Rather, it asserted that "once the driver alighted, the officer had independent reason to suspect criminal activity and present danger and it was upon this basis, and not the mere fact that respondent had committed a traffic violation, that he conducted the

search." 434 U.S. at 110 n.5. *Mimms* therefore provides no support whatever for the new rule proposed by the Solicitor General.

More fundamentally, the balance between the relevant Fourth Amendment interests does not support an across-the-board rule permitting protective searches in consensual encounters.

The interest in protecting officer safety is strong, but the weight of that interest here must be assessed by reference to the incremental protection to officer safety—above that available under current standards—that would result from the government's new rule. As we have discussed, existing precedent enables officers to protect themselves in all situations, under the *Terry* test, and to an even greater degree when justified by the need to establish control over the scene of permissible investigatory activities. Although the Solicitor General (Br. 20) points to the important interest in protecting officer safety, he does not explain the need for additional authority in this area.

On the other hand, the Court has consistently recognized the very substantial intrusion on the privacy interests protected by the Fourth Amendment that results from a search of an individual's person. "'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" *Terry*, 392 U.S. at 9 (quoting *Union Pacific Railroad Co.* v. *Botsford*, 141 U.S. 250, 251 (1891)); see also *Wyoming* v. *Houghton*, 526 U.S. 295, 303-304 & n.1 (1999) (upholding search of passenger's belongings in vehicle; distinguishing that situation

from more intrusive search of passenger's person); *United States* v. *Di Re*, 332 U.S. 581, 586-587 (1948).

That intrusion is much greater than the effect of controlling an individual's movements, which itself intrudes significantly on Fourth Amendment interests. *Wilson*, 519 U.S. at 422 ("[w]hen an officer commands passengers innocent of any violation to leave the vehicle and stand by the side of the road in full view of the public, the seizure is serious, not trivial") (Kennedy, J., dissenting).

Given officers' ability under existing precedent to protect themselves, and the seriousness of the intrusion on Fourth Amendment interests, there is no warrant for permitting protective searches based solely on reasonable suspicion of a threat to safety. That is especially true because of the practical reality that the factual showing that courts sometimes require under this standard generally is quite limited, because of the reluctance to second-guess officers' decisions in this area.

The additional constraints upon officer discretion under existing law—whether the reasonable suspicion of criminal activity required by *Terry* or that the officer was legitimately exercising authority to "command * * * the situation" as in *Summers*, *Wilson*, and *Mimms*—provide important limitations that cabin the risk of unjustified, random intrusions on these core privacy interests while allowing officers ample leeway to protect themselves. The Solicitor General's proposal, by contrast, would open the door to the very sort of random and pretextual searches that the Fourth Amendment was adopted to prevent.

Finally, utilizing a less demanding standard to justify protective searches that occur in conjunction

with a consensual encounter will have the perverse effect of discouraging individuals from cooperating with the police. As the Solicitor General points out (Br. 22), voluntary cooperation of the citizenry is essential to effective law enforcement. Once citizens understand that consenting to conversations with a police officer would give the officer greater leeway to conduct an intrusive and embarrassing public search, it is likely that many will be deterred from interacting with the police. That will hamper crime detection and impede investigations.[11]

There simply is no basis in this Court's precedents or in Fourth Amendment principles for permitting searches based solely on a reasonable suspicion of a threat to officer safety.

C. By The Time Officer Trevizo Searched Mr. Johnson, Their Encounter Was Not Related To The Vehicle Stop And Had Become Consensual.

The Fourth Amendment standard governing the permissibility of the protective search here turns on the nature of the encounter between Officer Trevizo and Mr. Johnson at the time the search was conducted. If Officer Trevizo lacked authority over Mr. Johnson's movements, and their interaction was therefore consensual, then the search must be justified by a reasonable suspicion of criminal activity as

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[11] The Solicitor General suggests (Br. 23) that rejection of his proposed standard will "encourage those who wish to avoid any contact with the police to arm themselves to deter officers from approaching them." But the approach and protective search by the officers in *Terry* was upheld by the Court in that case, and such searches have been upheld in many subsequent cases.

well as reasonable suspicion of a threat to officer safety.

If, on the other hand, Officer Trevizo was exercising authority over Mr. Johnson in order to "secure the scene" of the traffic stop as in *Summers* and *Wilson*, then only proof of a reasonable suspicion of a threat to officer safety would be required. Because the facts here plainly establish that the encounter was unrelated to the stop and consensual, the search violated the Fourth Amendment.

1. The Arizona court correctly determined that the encounter was both unrelated to the stop and consensual.

After assessing all of the relevant facts, the court below expressly determined that the interaction between Officer Trevizo and Mr. Johnson "was wholly unrelated to the stop and constituted a separate, and consensual, encounter." Pet. App. A12. There is no reason for this Court to second-guess that fact-bound determination.[12]

To begin with, the events here cannot be justified on the same basis as the officers' actions to "command the scene" addressed in *Summers* and *Wilson*. Although this Court has not specifically addressed the standard for determining when the facts permit officers to exercise this authority, it has made clear that the applicability of the Fourth Amendment does not turn on subjective intent. *Whren* v. *United States*, 517 U.S. 806, 813 (1996). The question here, therefore, turns on an objective assessment of the facts—whether Officer Trevizo legitimately exercised

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[12] Indeed, it is not clear that this issue is before the Court. See note 7, *supra*.

this authority over Mr. Johnson in view of the particular facts surrounding their encounter.

The court below observed that Officer Trevizo did not conduct the search, or even order Mr. Johnson out of the car, at the beginning of the vehicle stop. Pet. App. A11-A12. Officer Trevizo testified "that the traffic stop was routine and that no one in the vehicle had been suspected of criminal activity when she and the other officers made the stop." *Id.* at A12; see also J.A. 30. "Indeed, the front seat passenger remained in the car throughout the encounter. This fact lends further support to the conclusion that Trevizo's questioning of Johnson was wholly unrelated to the stop and constituted a separate, and consensual, encounter." Pet. App. A12.

Officer Trevizo herself testified that she was not exercising authority over Mr. Johnson. She stated that the reason she asked Mr. Johnson to leave the car was to speak with him "to gather intelligence about the gang that he might be in" and that the conversation likely would be more fruitful if she could "speak with him away from the other occupant that was still remaining inside the vehicle." J.A. 19. Also, "Trevizo conceded that, as far as she was concerned, Johnson 'certainly' 'could have refused' her request to get out of the car." Pet. App. A11.[13]

Thus, rather than acting to secure the scene, Officer Trevizo was conducting a "separate investigation of Johnson's possible gang affiliation, a matter

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[13] Although Officer Trevizo's intent is not dispositive of the question, it points in the same direction as the objective facts—that her actions did not in any way rest on the need to assert control over the scene of the vehicle stop.

wholly unrelated to the purpose of the traffic stop." Pet. App. A13.[14]

The Arizona court recognized that "[h]ad the officers immediately ordered Johnson out of the vehicle and conducted a pat-down search for the purpose of assuring their safety during the stop of the driver," it would be necessary to address "whether officers, in the interests of their own safety, and based solely on the seizure resulting from the initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous." Pet. App. A15. Because the facts made clear that the search was unrelated to the stop, the court did not address the issue.[15]

The court below also determined that "[n]one of Trevizo's verbal or nonverbal communications with Johnson before the pat down can reasonably be construed to have conveyed to him that his encounter with her was anything other than consensual." Pet. App. A12. The site of the vehicle stop—a heavily trafficked area near a major intersection (J.A. 10, 30, 32)—supports that conclusion because Mr. Johnson easily could have decided to leave the scene, some-

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[14] Moreover, there is no basis in the record for the statement by the dissenting judge below (Pet. App. A20) that the traffic stop was still ongoing. Officer Trevizo testified that she was not aware at the time of the nature of the interaction between the driver and the other officer. J.A. 43.

[15] As we discuss below (at pages 39-45), the Arizona court applied the correct legal standard in determining, based on the particular facts, that Officer Trevizo's invocation of "safety" was not sufficient to uphold the search under the principle recognized in *Summers* and subsequent cases. See also pages 20-22 & n.6, *supra* (discussing lower court cases).

thing that might not be true if the stop had occurred in an isolated rural area or on an interstate highway.

The Arizona court for all of these reasons concluded that the "initial lawful seizure of Johnson incident to the traffic stop of the driver evolved into a separate, consensual encounter stemming from an unrelated investigation by Trevizo of Johnson's possible gang affiliation." *Id.* at A14. It further found that "a reasonable person in Johnson's position would have felt free to remain in the vehicle." *Ibid.* "Trevizo's request that Johnson step out of the car to discuss gang activity, and not for officer safety purposes, was part of a consensual encounter." *Ibid.*

Petitioner and its amici urge this Court to overturn the court of appeals' assessment of the facts and hold that the encounter was part of an effort by Officer Trevizo to secure the scene of the stop and had not become consensual. It is not clear why they believe that this Court is better situated than the Arizona Court of Appeals to make that determination.

The Arizona court applied the correct legal standard. See Pet. App. A10-A11 (quoting *Michigan* v. *Chesternut*, 486 U.S. 567 (1988)). And it analyzed all of the relevant facts in reaching its conclusion. Cf. *United States* v. *Drayton*, 536 U.S. 194 (2002) (holding encounter consensual under much more coercive circumstances). There simply is no warrant for this Court to reach a different conclusion.[16]

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[16] The Solicitor General implies (Br. 15-16) that the Arizona court rested its decision on Officer Trevizo's subjective intent. In fact, the court recognized that her intent was relevant "'only to the extent that intent has been conveyed to the person confronted.'" Pet. App. A11-A12 (quoting *Chesternut*, 486 U.S. at

2. *The Court should not adopt a special Fourth Amendment principle permitting officers to exercise control over passengers for the entire duration of a vehicle stop.*

Apparently recognizing that the facts make clear that Officer Trevizo's encounter with Mr. Johnson had nothing to do with assuring safety in connection with the vehicle stop, petitioner and its amici argue for a legal rule that makes the facts irrelevant: they argue that an officer's authority over passengers lasts for the entire duration of a vehicle stop, no matter what happens during the stop. On this theory passengers in a stopped vehicle may be subject to a protective search based on reasonable suspicion of a threat to officer safety until the vehicle stop terminates.

Two justifications are advanced in support of this broad principle: *first*, that the officer's authority to "secure the scene" under the principle recognized in *Summers* and *Wilson* permits her to exercise control over passengers until the stop concludes; and *second*, that this Court's decision in *Brendlin* v. *California*, 127 S.Ct. 2400 (2007), holds that a passenger remains seized for the entire duration of the stop. Neither supports the very significant intrusion on Fourth Amendment interests that petitioner and its amici seek. Existing principles permit officers wide authority to protect themselves while giving appropriate protection to the very substantial privacy interests implicated by these searches.

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575 n.7). It concluded that her intent in fact had been communicated to Mr. Johnson. Pet. App. A12-A14.

In assessing these arguments, it is important to recognize that the passengers in a vehicle stopped for a traffic infraction are innocent bystanders. The driver is the individual suspected of violating the law. When—as in the category of cases at issue here—the officer has no basis for believing that the vehicle was involved in criminal activity, the passenger is seized simply by virtue of being in the vehicle and not because there is any basis whatever for believing that he is involved in illegal activity.

A second important consideration is the intrusiveness of a protective search. The passenger is compelled to leave the car and stand, often in a busy intersection in full view of the public, while he is touched by an officer in every part of his body. It is a "severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry*, 392 U.S. at 24-25; see also pages 32-33, *supra*.

These factors weigh strongly in favor of limiting this authority to those situations in which it is clearly justified, especially because here—unlike in *Summers*—there is no authorization by an independent magistrate.

Petitioner and its amici focus (*e.g.*, U.S. Am. Br. 25-27; States Am. Br. 9-12) on the particular dangers to police officers in the vehicle stop context. But the Court's Fourth Amendment jurisprudence already provides substantial leeway to enable officers to protect themselves. See pages 16-22, *supra*. The question here is whether the Fourth Amendment permits officers to exercise additional, extremely broad, authority to conduct highly intrusive searches.

Finally, in interpreting the Fourth Amendment, the Court should take account of the original understanding of the scope of the Amendment's protections. As Justice Scalia has explained, the common law permitted a search incident to arrest based on probable cause. *Minnesota* v. *Dickerson*, 508 U.S. 366, 381 (1993) (concurring opinion). Even though the common law permitted a brief detention for questioning, Justice Scalia expressed skepticism that there was "any precedent for a physical search of a person thus temporarily detained for questioning" on the basis of reasonable suspicion of criminal activity. *Ibid.* He "doubt[ed] * * * whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity." *Ibid.* (emphasis in original).

That conclusion is even more applicable here, where the detention of the passenger does not rest on *any* individualized suspicion of criminal activity. To the extent such searches are permissible at all, they should be allowed only in very narrowly-defined circumstances in view of the governing historical precedent.

a. ***Authority to command the situation***

As we have discussed (see pages 19-22, *supra*), the duration of law enforcement officers' authority to "command the situation," as in *Summers*, *Wilson*, and *Mimms*, depends upon the underlying purpose. Where the detention occurs in connection with the execution of a search warrant issued by an independent magistrate, and the purpose of the detention is to enable officers to execute the warrant, the de-

tention may last for the time it takes to execute the warrant.

The Court has never addressed the duration of officers' authority over passengers in connection with vehicle stops. It did state in *Knowles* v. *Iowa*, 525 U.S. 113, 118 (1998), that officers may "perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous, *Terry* v. *Ohio*, 392 U.S. 1 (1968)." In addition to being dicta (*Knowles* involved only the search of a vehicle and its driver, and held the searches unconstitutional), the Court's statement is unclear: by citing *Terry* it may be implying that both prongs of the *Terry* standard must be satisfied, as they were in *Mimms* (see pages 31-32, *supra*).

Moreover, the *Knowles* Court said nothing about the circumstances in which officers could exercise this authority. And in its prior decision in *Wilson* the Court expressly declined to address the question whether the officer has authority to detain a passenger for the entire duration of the traffic stop. 519 U.S. at 415 n.3. There is no warrant for adoption of an across-the-board rule permitting officers to control passengers, and therefore conduct protective searches on the basis only of reasonable suspicion of a threat to safety, for the entire duration of a vehicle stop.[17]

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[17] This question obviously is entirely different from the duration of an officer's control over the driver, who has been stopped on the basis of reasonable suspicion of unlawful conduct and who obviously must remain for the time reasonably needed to complete procedures associated with the stop. Cf. *Caballes*, 543 U.S. at 407.

The Court has "long held that the 'touchstone of the Fourth Amendment is reasonableness.'" *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996). It therefore has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ibid.*

The inquiry conducted by the Arizona court comported fully with this approach. That court assessed all of the relevant facts in determining whether the seizure and protective search occurred in connection with the officers' need to secure the scene of the search and concluded that it did not.

Such a fact-specific inquiry is necessary because the relevant facts can vary substantially depending on the circumstances of the traffic stop. Assume, for example, a vehicle stop at Pennsylvania Avenue and Twelfth Street, N.W., in downtown Washington, D.C. Once the officers secure the scene and make a determination that the passengers are not involved in the violation giving rise to the stop, what would be the basis for requiring the passengers to remain at the scene? As Justice Kennedy has observed, "[t]raffic stops, even for minor violations, can take upwards of 30 minutes." *Wilson*, 519 U.S. at 422 (dissenting opinion).

On the other hand, if a stop occurs on a highway or on a deserted road late at night, safety needs might justify detention of passengers for the entire length of the vehicle stop. And that also would be true if the passenger is involved in the violation because, for example, he is the owner of the vehicle.

Even if, contrary to our submission, the Court recognizes a bright-line rule permitting police in every case to detain passengers for the duration of a

vehicle stop, that does not mean that officers should be permitted *during that entire period* to conduct protective searches based on reasonable suspicion of a threat to safety. The purpose of such searches is to secure the scene so that the officers may conduct the vehicle stop. That argues for permitting these searches when justified by that purpose, but applying the *Terry* standard when, as in this case, the search is not related to asserting initial control over the scene. Cf. *Ybarra*, *supra* (holding impermissible under the Fourth Amendment protective searches of every patron in a bar that was the subject of a search warrant).

This conclusion is compelled by the intrusiveness of the government action. "When an officer commands passengers innocent of any violation to leave the vehicle and stand by the side of the road in full view of the public, the seizure is serious, not trivial." *Wilson*, 519 U.S. at 422 (Kennedy, J., dissenting). Subjecting an individual to a search in those circumstances multiplies significantly the intrusion on Fourth Amendment interests.

Applying the *Terry* standard to circumstances unrelated to the officers' need to secure the scene gives officers ample leeway to protect themselves and the public—after all, that standard governs encounters on crowded streets. See, *e.g.*, *Sakyi*, 160 F.3d at 169 (applying *Terry* standard to uphold search); page 22 note 6 (citing cases in which the facts known to the officer prior to the protective search satisfied both prongs of the *Terry* standard).

In addition, officers may ask an individual to leave the scene if they believe he may hamper the investigation. His unwillingness to do so could provide sufficient basis for a protective search under

Terry. Cf. *Hicks* v. *State*, 631 A.2d 6, 7-10 (Del. 1993) (pat-down justified where defendant, who approached while the officer was conducting an investigation in a high-crime area, refused to leave, engaged in furtive movements, behaved erratically, and gave evasive answers).[18]

This approach also ensures that a broad ability to engage in protective searches will not be used as a pretext for conducting an investigatory search during the vehicle stop. Here, for example, even if Officer Trevizo's suspicion was "reasonable," which we do not concede (see pages 48-53, *infra*), it was only barely so. And it is clear that her actual goal was to investigate Mr. Johnson and his possible gang affiliation.

The Court accordingly should refuse to extend the limited "control the scene" principle to encompass the entire duration of every vehicle stop and reaffirm the applicability of the fact-specific standard applied by the Arizona court.

b. *Standard for determining whether encounter is consensual*

The Solicitor General argues (Br. 16) that the seizure of a passenger in connection with a vehicle stop may not evolve into a consensual encounter unless the officer explicitly states that the passenger

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[18] Moreover, the Solicitor General is wrong in asserting (Br. 22-23) that a reasonableness test will force officers to choose between conducting legitimate vehicle stops and protecting their safety. As we discuss in the text, if the protective search rests on the officer's need to assert control over the scene of the stop, then it may be upheld on the basis of a reasonable suspicion of a threat to safety.

is free to leave. But he does not provide any reason for applying this special rule in place of the general standard set forth in *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980), for determining whether an encounter is consensual.

Certainly nothing in this Court's decision in *Brendlin* justifies a departure from the *Mendenhall* approach for vehicle passengers. The *Brendlin* Court applied the *Mendenhall* standard and concluded that a passenger would not feel free to leave at the outset of a vehicle stop. 127 S.Ct. at 2405, 2410. It did not adopt a blanket rule that applies to all traffic stops no matter how long they last.

Indeed, the bright-line rule sought by petitioner and its amici closely resembles the standard the Court rejected in *Robinette*. There, the Court considered—in the context of a claim that a consent to search was voluntary—a rule "that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation." 519 U.S. at 36. The Court held that it was "unrealistic" to require such a statement and that a consent could be voluntary notwithstanding the absence of such a warning. *Id.* at 39-40.

The same conclusion applies here—an encounter between an officer and a passenger may have become consensual even though the officer did not make an express statement to that effect. The analysis, as in *Robinette* (519 U.S. at 40), depends upon an assessment of all of the relevant facts and circumstances.

In addition, if the conclusion that a passenger is "seized" for the entire duration of a vehicle stop

means that an officer may subject the passenger to a protective search based only on reasonable suspicion of a threat to safety, such an approach would have all of the flaws of the bright-line rule based on *Summers* and *Wilson* just discussed. It should be rejected for the same reasons.

One of the principal concerns animating the Court's decision in *Brendlin* was that "[h]olding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal." 127 S.Ct. at 2410 (footnote omitted). It would be ironic indeed if the shield provided to passengers in *Brendlin* were transformed into a sword subjecting them to intrusive protective searches for the entire duration of a vehicle stop based solely on reasonable suspicion of a threat to safety.

Finally, adopting the principle that a passenger automatically is seized for the duration of a traffic stop likely would hinder law enforcement efforts. Officers frequently ask passengers to consent to various types of searches during the course of a vehicle stop. The fact that the passenger is seized will be a factor weighing against finding that such a consent was voluntary when a court assesses that question in light of "'all of the circumstances.'" *Robinette*, 519 U.S. at 40. And the lengthy detentions of passengers that would result from such a rule could lead to the suppression of statements made by a passenger in response to an officer's questions on the ground that the passenger's treatment would "render[] him 'in custody' for practical purposes" and entitled him "to the full panoply of protections prescribed by *Miranda*

[v. *Arizona*, 384 U.S. 436 (1966)]." *Berkemer* v. *McCarty*, 468 U.S. 420, 440 (1984)

The most appropriate way to accommodate all of the relevant interests—privacy and law enforcement—is to apply in the vehicle stop context the very same standard that apply in other contexts. Here, as the Arizona court concluded, application of that standard leads to the conclusion that the stop had evolved into a consensual encounter.

D. Even If The Search Of Mr. Johnson Could Be Upheld Solely Upon Reasonable Suspicion That He Was Armed And Dangerous, The Facts Known To The Officer Here Would Not Satisfy That Standard.

If the Court determines, contrary to our submission, that the search of Mr. Johnson was permissible even if it were supported only by a reasonable suspicion of a threat to safety, it would be necessary to assess whether the facts known to Officer Trevizo satisfied that standard.

The court of appeals expressly declined to address that issue, because it was not necessary to that court's decision. Pet. App. A14. This Court should remand the case to allow the Arizona court to make that determination in the first instance. *E.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1053 (1983).[19]

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[19] The State erroneously asserts (Pet. Br. 7) that Mr. Johnson did not raise this issue at the suppression hearing. The Motion to Suppress (at 5) clearly argued the point, Mr. Johnson raised it in the court of appeals (see Ct. App. Opening Br. 13; Ct. App. Reply Br. 1), and the court of appeals specifically reserved decision (Pet. App. A14).

In the event this Court determines that it is appropriate to decide that issue, the Court first should address the applicable legal standard. The Court in *Terry* stated that a protective search is permissible when the officer "has reason to believe that he is dealing with an armed and dangerous individual * * *. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27.

This standard is a demanding one. It requires specific facts giving rise to particularized reasonable suspicion both that the individual is "armed" and that he is "dangerous." *Terry*, 392 U.S. at 21 ("in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion"). The standard does not come close to being satisfied here.

To begin with, none of the facts typically relied upon by courts upholding protective searches are present here. Petitioner has conceded that Officer Trevizo did not possess reasonable suspicion of criminal activity, a factor typically cited in finding a reasonable suspicion of officers' safety. See pages 18-19, *supra*.

When facts establishing a reasonable suspicion of criminal activity are not present, courts require the presence of at least one of several factors providing a concrete indication that the individual might pose a danger—such as a bulge under the individual's clothing, or furtive or nervous movements indi-

cating that the individual was seeking to conceal a weapon.[20]

Officer Trevizo did not cite *any* of these factors. She did not detect a bulge under Mr. Johnson's clothing. Mr. Johnson did not make unusual or furtive movements. He did not even appear nervous. In addition, he vehicle stop did not occur in a high-crime neighborhood, close to recent criminal activity, or very late in the evening.

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[20] *E.g.*, *United States* v. *Black*, 525 F.3d 359, 365-366 (4th Cir. 2008) (frisk reasonable because noticeable bulge in person's pocket, and his refusal to remove his hand from his pocket), cert. denied, No. 07-11537, 2008 WL 2518091 (U.S. Oct. 6, 2008); *United States* v. *Raymond*, 152 F.3d 309 (4th Cir. 1998) (frisk reasonable because passenger exited car in a strange fashion, clutching his stomach); *United States* v. *Moorefield*, *supra* (frisk reasonable because of passenger's furtive hand movements and refusal to heed officer's commands); *United States* v. *Fryer*, 974 F.2d 813 (7th Cir. 1992) (frisk reasonable because of furtive movements between passenger and driver, and the late hour); see also *United States* v. *Soares*, 521 F.3d 117 (1st Cir. 2008) (pat-down of passenger justified where, while making stop in high-crime area at 1:15 a.m., officers observed him and other passengers making furtive movements and, after the stop, the passenger was verbally abusive, repeatedly ignored orders to remain still, and continually waved his arms around erratically); *United States* v. *Zollicoffer*, 951 F.2d 1291 (D.C. Cir. 1991) (pat-down of passenger in car stopped for traffic violations justified where car had appeared to be fleeing from police, passenger moved his hands under his coat in a manner suggesting he was hiding a gun, and, when passenger removed coat, officer observed bulge that appeared to be a gun); *State* v. *Horrace*, 28 P.3d 753 (Wash. 2001) (driver of vehicle stopped in late evening made pronounced movements in passenger's direction and could have concealed weapon in passenger's jacket).

Moreover, courts cite an individual's cooperation, like Mr. Johnson's here, as a factor weighing against the conclusion that the individual was armed and dangerous. *Hawkins* v. *United States*, 663 A.2d 1221, 1227 (D.C. 1995); *McCain* v. *Commonwealth*, 659 S.E.2d 512, 517 (2008); compare *United States* v. *Rice*, 483 F.3d 1079, 1081, 1084 (10th Cir. 2007) (evasiveness and eagerness to hide identity may be a sign of criminal activity or dangerousness). Indeed, Mr. Johnson's statement that he had been incarcerated for burglary is especially relevant in rebutting a reasonable suspicion of dangerousness: an individual bent on harming the police would hardly put the officer on notice by admitting to a prior criminal record.

Several facts cited by Officer Trevizo and relied upon by the State have been held irrelevant by other courts. Thus, courts take a skeptical view of claims relating to "eye contact" between the suspect and the officer, finding such "facts" too subjective to justify a search. *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1136 (9th Cir. 2000). Here, Mr. Johnson's scrutiny of the officers was understandable given their use of an unmarked car. Mr. Johnson's failure to have identification and his possession of the scanner, both of which were entirely lawful, are similarly irrelevant.[21]

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[21] Mr. Johnson's possession of the scanner might have been relevant if the scanner had been in use. But Officer Trevizo testified that she did not know whether it was turned on. J.A. 31. In that circumstance, Mr. Johnson could easily have been one of the "plenty of people that like to listen to scanners" (J.A. 17) who was taking the instrument to a friend's house or bringing it home from a repair shop.

Although known association with a gang known to carry guns may be a relevant consideration, the facts known to Officer Trevizo did not rise to the level that has been held sufficient to satisfy the standard. Compare *United States* v. *Flett*, 806 F.2d 823, 828 (8th Cir. 1986) ("known member of national motorcycle gang" that had "violent propensities"; individual was known as the gang's "enforcer" and had previous firearms charge). To the contrary, Officer Trevizo stated only that "gang members will often, in general, possess firearms" and said nothing about the Crips gang to which she asserted that Mr. Johnson might belong. J.A. 10. And Officer Trevizo's speculation that Mr. Johnson was engaged in gang activity is undercut significantly by the fact that he wore blue and the driver wore red (see pages 4-5, *supra*), because "typically, certain gangs have certain colors that they're most affiliated with." J.A. 9. Similarly, the fact that Mr. Johnson originally lived in Eloy, Arizona, is not an indicator of gang association—thousands of people live in that community and most are not gang members.

Finally, the fact that Mr. Johnson had been convicted for a nonviolent crime, burglary, also provides insufficient support for a conclusion that he was both armed and dangerous. *United States* v. *Davis*, 94 F.3d 1465, 1467, 1469 (10th Cir. 1996); *People* v. *Galvin*, 535 N.E.2d 837, 846 (Ill. 1989).

Applying the armed and dangerous standard strictly here is especially important because it would be the sole basis for allowing a very significant intrusion on protected Fourth Amendment interests of innocent passengers. That is unlike *Terry*, where the officer also must have a reasonable suspicion of criminal activity; and it is unlike the prior vehicle

stop cases in which a search was permissible only to establish control at the outset of the stop in order to investigate or process the observed motor vehicle violation.

The facts known to Officer Trevizo plainly were not sufficient to give rise to a reasonable suspicion that Mr. Johnson was armed and dangerous. They are generic observations that could apply to a very substantial number of unarmed individuals—they do not provide a basis for a sufficiently focused level of suspicion to satisfy the reasonableness standard. The protective search here therefore violated the Fourth Amendment. See, *e.g.*, *Davis*, 94 F.3d at 1469-1470 (although individual was associated with a gang and parked his car near a location known for criminal activity, court held that in the absence of a "suspicious bulge" in his pockets, or a "threatening move towards the officers" there was insufficient evidence to support a reasonable suspicion that he was carrying a firearm).

E. If This Court Reverses The Judgment Below, It Should Remand To Allow The Arizona Courts To Consider Mr. Johnson's Argument Under The Arizona Constitution.

Respondent argued in the Arizona courts that the fruits of the search should be suppressed under both the Federal Constitution and the Arizona Constitution. If the court below erred in holding that search violated the Fourth Amendment, the case should be remanded to enable the Arizona courts to consider whether the search violated the Arizona Constitution.

This Court's consistent practice in such circumstances is to reverse the state court's judgment based on an erroneous interpretation of federal law and remand for proceedings "not inconsistent with" that determination, leaving the state court free to consider state constitutional arguments not addressed in its earlier decision. See, *e.g.*, *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 10 n.5 (1990); *California* v. *Ramos*, 463 U.S. 992, 997 n.7 (1983) ("Of course, on remand from this Court, the state court is free to determine whether as a matter of state law" to reach the same result.). See also *Washington* v. *Recuenco*, 548 U.S. 212, 223 (2006) (Stevens, J., dissenting) ("The Washington Supreme Court can, of course, reinstate the same judgment on remand * * * because that court chooses, as a matter of state law, to adhere to its view * * * .").

Mr. Johnson appropriately raised and preserved his claims based on the Arizona Constitution. He argued before the trial court that suppression of the fruits of the search was warranted under the express right to privacy in Article II, section 8 of the Arizona Constitution. See Motion To Suppress at 1; J.A. 57. The argument was again raised in the court of appeals. See Ct. App. Opening Br. 7 (citing Ariz. Const. art. II, § 8, and *State* v. *Tykwinski*, 824 P.2d 761, 767 (Ariz. Ct. App. 1991)); Ct. App. Reply Br. 10 (citing *State* v. *Bolt*, 689 P.2d 519 (Ariz. 1984) (en banc)). The State responded to the argument (see Ct. App. Answering Br. 8-9), but the court of appeals did not find it necessary to address the issue.

This argument is reasonably grounded in the plain language of the Constitution's right to privacy and judicial decisions holding that this provision in some respects confers broader privacy protections

than the Fourth Amendment. See *Bolt*, 689 P.2d at 523-524; *Tykwinski, supra*; *Rasmussen* v. *Fleming*, 741 P.2d 674, 682 (Ariz. 1987) (en banc). Although the Arizona courts have to this point only applied that general principle to recognize broader protection in the context of searches of an individual's residence, nothing in their decisions precludes such a determination in the context of invasive searches of an individual's person.

If this Court does not affirm the opinion below, it therefore should remand to provide the Arizona courts the opportunity to reach potential independent state-law grounds for suppressing the fruits of the search of Mr. Johnson.

CONCLUSION

The judgment of the Arizona Court of Appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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STATE OF ARIZONA,

Petitioner,

vs.

LEMON MONTREA JOHNSON,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals

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ARGUMENT

A. The Fourth Amendment permits an officer to conduct a pat-down search of a passenger in a lawfully stopped vehicle.

Contrary to Respondent's assertions, the facts of the present case do not require this Court to consider the validity of a protective pat down in any circumstance other than the pat down of a vehicle passenger seized during a lawful traffic stop. (*See* Resp. Br. 25-26.) Johnson virtually concedes that, if he was seized at the time of the frisk, the frisk was lawful. (Op. Br. 7-8; Resp. Br. 10, 12, 20-21.)

That concession is a wise one in view of the prior decisions of this Court upholding a variety of police practices on the ground that their minimal intrusion on privacy rights is outweighed by the public interest in officer safety. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968) (permitting frisk for officer safety in the absence of probable cause for arrest); *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977) (per curiam) (police may routinely order a driver from his vehicle); *Michigan v. Long*, 463 U.S. 1032, 1047-48 (1983) (police may conduct a protective search of passenger compartment of motor vehicle during investigatory stop of occupant of vehicle); *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997) (extending the *Mimms* rule to passengers); *Brendlin v. California*, 127 S. Ct. 2400, 2406-07 (2007) (a vehicle passenger is seized along with the driver, and a reasonable passenger would not feel free to leave the scene). *See also Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (stating in *dictum* that

police officers "may order out of a vehicle both the driver, and any passengers; [and] perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous.").

Johnson argues, however, that a different result obtains here because he was no longer seized when he stepped out of the car. According to Johnson, in such circumstances pat-down searches are permissible only when (1) the officer has reasonable suspicion of criminal activity, or (2) the police are exercising "command of the situation" per *Michigan v. Summers*, 452 U.S. 692, 703 (1981). (Resp. Br. 2, 21.)

But in this case, Johnson was seized throughout the duration of his encounter with Officer Trevizo. This is because, as *Brendlin* states, the stop of a car communicates to a reasonable passenger that he is not free to terminate the encounter with the police and move about at will. 127 S. Ct. at 2407. Indeed, if a passenger stays at the scene of the traffic stop, this Court has indicated that the passenger has affirmatively submitted to the seizure of his person:

> [W]hat may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away. Here, Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside.

Id. at 2409. Accordingly, Johnson was seized as long as he remained, absent some action from the officers that would have communicated to him that he was free to leave. That did not happen in this case. Officer Trevizo never indicated to Johnson that he was free to leave, never told him he did not have to answer her questions, and never sought Johnson's permission to talk with him or pat him down. (J.A. 34-36, 45.) Nothing Trevizo did or said told Johnson he was free to leave.

Johnson's argument also fails because *Terry*, *Mimms*, *Long*, *Wilson*, *Brendlin*, and *Knowles* collectively establish that passengers can be frisked when an officer has a reasonable belief that the passenger is armed and dangerous. The logic of those cases is not limited to facts in which the officer has reasonable suspicion of criminal activity or the officer is exercising "command of the situation."

First, the suspicion of criminal activity is not a necessary prerequisite to a pat down, particularly in a traffic stop situation. In *Mimms*, for example, the officer "had no reason to suspect foul play" and saw "nothing unusual or suspicious about the [driver's] behavior." 434 U.S. at 109. Nevertheless, requiring the driver to exit the vehicle was *per se* reasonable because of the dangers of the traffic stop situation. *Id.* Once the driver had exited the car, the bulge in his jacket provided a reasonable basis for the pat down. Although *Mimms* involved the driver of the vehicle, this Court has not limited the protective search to drivers. *See Long*, 463 U.S. at 1047 ("*Terry* need not

be read as restricting the preventative search to the person of the detained suspect.").

Johnson cites Justice Harlan's concurrence in *Terry* for his proposition that criminal activity is a prerequisite for a pat down. (Resp. Br. 15, 29.) In *Terry*, Justice Harlan wrote: "I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime." 392 U.S. at 32-33 (Harlan, J., concurring). As Professor LaFave points out, however, "Harlan's basic point is eminently sound," but "*there will sometimes be some other proper reason* (e.g., . . . *to conduct an investigatory stop of some other person*) for being in the presence of the person who is believed to present the risk." 4 W. LaFave, Search and Seizure § 9.6(a), p. 616 (4th ed. 2004) (footnotes omitted; emphasis added). It suffices that "the officer's action was justified at its inception." *Terry*, 392 U.S. at 20. In this case, the stop of the car for an insurance infraction justified the officer's actions at the inception. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (noting that a routine traffic stop is "analogous to a so-called *Terry* stop"). Thus, if an officer develops a safety concern during a legitimate traffic stop, further reasonable suspicion of criminal activity is not necessary. *See, e.g., Mimms*, 434 U.S. at 111-12.

Second, contrary to Johnson's assertions (Resp. Br. at 36), Officer Trevizo was exercising "command of the situation" when she patted Johnson down for weapons. Johnson contends otherwise because Officer

Trevizo was conducting a separate investigation into his gang affiliations. (*Id.*)

Reasonableness is the standard for a pat down. *Terry*, 392 U.S. at 19. Reason dictates that the authority to conduct a pat down of a lawfully detained passenger is coincident with the risk of possible danger posed by that passenger. If an individual who may be armed and dangerous is at the scene, the scene is not secure. *See Brendlin*, 127 S. Ct. at 2407 ("It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety.").

Moreover, in this case the traffic stop was ongoing (*see* Pet. Br. 18-21), so the need to exercise command of the situation continued. There is no evidence in the present case that the driver's license and registration had been returned at the time of Johnson's pat down. In a lawful traffic stop, unlike a consensual street encounter, an officer's authority to control a passenger is presumed. *Wilson*, 519 U.S. at 415; *Brendlin*, 127 S. Ct. at 2407 ("unquestioned [police] command" is "at odds with any notion that a passenger would feel free to leave ... without advance permission") (internal quotes and citation omitted). Johnson was seized when the gang task force pulled the car over, he remained seized when he exited the car, and Officer Trevizo was exercising "command of the situation" when she frisked him upon her reasonable belief that he was armed and dangerous.

B. An officer may conduct a pat down based on the reasonable belief that a person is armed and dangerous even absent an initial seizure founded upon suspicion of criminal activity.

Johnson claims that to satisfy *Terry*, there must be both an initial seizure founded upon reasonable suspicion of criminal activity *and* the reasonable belief that the person is armed and dangerous. (Resp. Br. 28-30.) Because there is no dispute in this case about the legality of the initial traffic stop, there is no question that the initial seizure of Johnson was justified. *See Brendlin*, 127 S. Ct. at 2406; *Mimms*, 434 U.S. at 111-12. So this Court need not reach the broader issue whether a pat down may be justified independent of an initial seizure founded upon suspicion of unlawful activity.

Should this Court nonetheless reach that issue, we agree with the United States that "it is constitutionally reasonable for officers who have reasonable concerns for their own safety to take protective measures," irrespective of the basis for the initial stop. (U.S. Br. 16-17.) In *Terry* this Court upheld the constitutionality of the pat down without resolving whether an investigative stop supported by reasonable suspicion preceded the protective frisk. 392 U.S. at 19 n.16. The Court wrote:

> Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority,

> has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.

Id. The Court looked at the pat-down search independent of the reason for the investigative stop. This demonstrates that "an officer's interest in protecting the officer's own safety is distinct from – and may justify actions that could not be supported by reference to – the general societal interest in investigating crime." (U.S. Br. 17-18.)

Johnson specifically takes issue with this and other points advanced on pages 17-21 of the United States' brief. (Resp. Br. 28-30.) As the United States notes, *Terry* clearly distinguishes a protective search for weapons, conducted strictly for officer safety, from the more general search of a person or place, the principal purpose of which is to locate evidence of crime.[1] 392 U.S. at 25-26, 29. The distinction is also

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[1] In its brief in support of Respondent, the National Association of Criminal Defense Lawyers reviews the pre-Revolution history of hostility toward warrantless searches which the amicus says informed the drafting of the Fourth Amendment. (Crim. Def. Lawyers Br. at 6-10.) This traditional hostility was directed at "writs of assistance," or general warrants purporting

(Continued on following page)

seen in numerous other Fourth Amendment contexts in which the danger facing officers will have no connection to the investigation into criminal activity. (*See* cases cited in U.S. Br. 18-21.) This Court's oft-repeated view that officer safety concerns may exist independent of a criminal investigation cannot be squared with Johnson's assertion that the suspicion of criminal activity is a necessary precondition to conducting a pat-down search. (Resp. Br. 25-27.)

Even if Johnson was no longer seized when he left the vehicle, Officer Trevizo was entitled to frisk him based on her reasonable belief that he was armed and dangerous. As noted in the United States' brief, "this Court has never held that a police officer's ability to conduct a *Terry* frisk is contingent upon the officer having reasonable suspicion that a person with whom the officer is dealing has committed or is committing a crime." (U.S. Br. 16.) Pat-down searches

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to search persons and places for suspected uncustomed goods. (*Id.*) Such general searches for evidence bear no relation to the narrowly proscribed protective search for weapons at issue in the present case. *See Terry*, 392 U.S. at 25-26 (expressly distinguishing the search for evidence incident to arrest from the protective search for immediately accessible weapons). According to Professor LaFave, as recently as 1960, the stop and frisk as we now think of it "had been largely ignored by commentators and dealt with ambiguously by most courts." 3 W. LaFave, Criminal Procedure § 3.8(a), p. 300 (3rd ed. 2007) (internal quotation and footnote omitted). Indeed, prior to the *Terry* decision, the "troublesome issues" involved in a stop and frisk "ha[d] never before been squarely presented to this Court." *Terry*, 392 U.S. at 9-10.

are bound by one limitation: they must be reasonable under the totality of the circumstances. *Terry*, 392 U.S. at 19. The "sole justification" for a pat down is to protect police officers and others. *Id.* at 29. This concern for officer safety does not terminate at a point certain, unlike an investigative detention which generally terminates when "a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.). Whether Johnson felt free to leave the investigative detention is irrelevant to whether he reasonably posed a danger to the officers. The need for a pat down arises from concern about officer safety, and as long as "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger," *Terry*, 392 U.S. at 27, a pat down is justified regardless of the status of the investigative detention. *See Long*, 463 U.S. at 1052 ("a *Terry* investigation . . . involves a police investigation at close range, when the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected, and the officer must make a quick decision as to how to protect himself and others from possible danger") (internal quotes and citation omitted).

C. Officer Trevizo reasonably believed that Johnson was armed and dangerous.

Johnson argues in the alternative that he should prevail even if officers participating in traffic stops may frisk passengers whom they reasonably believe

are armed and dangerous because, in his view, Officer Trevizo lacked reasonable suspicion that he was armed and dangerous. (Resp. Br. 49-53.) The Arizona Court of Appeals did not reach this issue, and, as Johnson admitted in his Brief in Opposition (p. 6), it is not fairly subsumed within the Question Presented.

If this Court decides to reach the issue, the evidence supports the trial court's judgment. (J.A. 76-77.) At the suppression hearing, Officer Trevizo provided specific and articulable facts known to her which justified her belief that Johnson might be armed and potentially posed a danger. Johnson watched the officers out the rear of the car as they approached the vehicle. (J.A. 13-14.) This alerted Trevizo because in her experience most people involved in a traffic stop look frontward instead of maintaining eye contact with officers who are behind them. (*Id.*) Johnson did not have identification on his person. (*Id.* at 15.) Johnson carried a police scanner in his jacket pocket. (*Id.* 16-17, 20.) Trevizo said this strongly indicated possible criminal activity because of the ready nature of the device for the purpose of evading law enforcement. (*Id.*) Johnson was wearing blue clothing, colors affiliated with the Crips street gang. (*Id.* at 17-18.) Moreover, the traffic stop took place near a known Crips neighborhood, and Johnson said he was from Eloy where Officer Trevizo knew the Crips were a dominant gang. (*Id.* at 10, 19.) She testified that gang members were known to possess firearms. (*Id.* at 10.) Johnson also told her he had

done prison time for burglary, from which she inferred he was a convicted felon. (*Id.* at 19, 21.)

Johnson complains that these are "generic observations that could apply to a very substantial number of unarmed individuals." (Resp. Br. 53.) But this Court has emphasized that a "totality of the circumstances," or "whole picture," evaluation of the facts under the Fourth Amendment does not focus on potential innocent explanations for each individual factor. *United States v. Arvizu*, 534 U.S. 266, 266-67 (2002); *United States v. Cortez*, 449 U.S. 411, 418 (1981). "The process does not deal with hard certainties, but with probabilities," and includes "consideration of the modes or patterns of operation of certain kinds of lawbreakers." *Cortez*, 449 U.S. at 418. Thus, a trained officer is permitted to draw "inferences and deductions that might well elude an untrained person." *Id.* Officer Trevizo was trained and experienced in dealing with street gangs, and she articulated a reasonable basis for her belief that Johnson was armed and posed a potential danger to the officers.

CONCLUSION

This Court should reverse the judgment of the Arizona Court of Appeals and hold that Officer Trevizo's pat-down search of Johnson for weapons was reasonable under the Fourth Amendment.

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AMICUS CURIAE BRIEF

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No. 07-1122

In the Supreme Court of the United States

STATE OF ARIZONA, PETITIONER

v.

LEMON MONTREA JOHNSON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA, DIVISION TWO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a police officer who is participating in a lawful traffic stop may frisk a passenger when the officer has reasonable suspicion that the passenger is armed and dangerous but lacks reasonable suspicion that the passenger is committing or has committed a criminal offense.

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INTEREST OF THE UNITED STATES

This case presents the question whether a police officer who is participating in a lawful traffic stop may frisk a passenger when the officer has reasonable suspicion that the passenger is armed and dangerous but lacks reasonable suspicion that the passenger is committing or has committed a criminal offense. The Court's resolution of that question will affect the admissibility of evidence in federal prosecutions. In addition, federal law enforcement officers regularly stop vehicles, and the conduct of those officers in that dangerous and recurring situation will be governed by the Court's ruling in this case. Accordingly, the United States has a substantial interest in the resolution of the question presented.

STATEMENT

1. On April 19, 2002, Officer Maria Trevizo and two other officers were on patrol in Tucson, Arizona, in an area close to a neighborhood associated with the Crips gang. At approximately 9 p.m., the officers pulled over a car after a license plate check revealed that the vehicle's registration had been suspended for insurance-related reasons. As the officers made the stop, Officer Trevizo saw respondent, who was sitting in the back passenger seat, look back at the officers' car, say something to the two people in the front seat, and continue looking back towards the officers. Pet. App. A2-A3 & n.1.

Once the car was stopped, one of the other officers instructed the occupants to keep their hands visible and directed the driver to get out of the car. The second officer approached the passenger side and spoke with the front-seat passenger, who remained in the vehicle. Pet. App. A3-A4.

Officer Trevizo approached the rear of the vehicle and made contact with respondent. Officer Trevizo was a member of a gang task force, and she observed that respondent was wearing clothing, including a blue bandana, that she considered consistent with Crips membership. J.A. 17. Officer Trevizo also saw that respondent had a scanner in his jacket pocket, something she found highly unusual and of concern because a person would not ordinarily carry a scanner "unless they're going to be involved in some kind of criminal activity or going to try to evade the police by listening to the scanner." J.A. 16. In response to questions from Officer Trevizo, respondent provided his name and date of birth but said he did not have any identification. Respondent stated that he was from Elroy, Arizona, a place Officer

Trevizo knew was home to a Crips gang. Respondent also said that he had served time in prison for burglary and had been out for about a year. Pet. App. A3-A4.

Officer Trevizo asked respondent to exit the vehicle and respondent complied. Pet. App. A4; J.A. 19, 35. After respondent was outside of the car, Officer Trevizo directed him to turn around and "patted him down for officer safety" because she "had a lot of information that would lead [her] to believe [respondent] might have a weapon on him." Pet. App. A4-A5 (first pair of brackets in original). During the pat-down, Officer Trevizo felt the butt of a gun near respondent's waist. *Id.* at A5. Respondent began to struggle, and Officer Trevizo placed him in handcuffs. *Ibid.*

2. Respondent was charged in state court with, *inter alia*, possession of a weapon by a prohibited possessor. He moved to suppress the evidence seized during the pat-down search, arguing that, even if Officer Trevizo had reasonable suspicion that respondent was armed, she lacked reasonable suspicion that he was engaged in criminal activity. J.A. 57-58. The trial court denied the motion, and a jury found respondent guilty on the firearm charge. Pet. App. A5; J.A. 75-78.

3. A panel of the Arizona Court of Appeals reversed by a 2-1 vote. Pet. App. A1-A23.

a. The majority determined that respondent had been seized for Fourth Amendment purposes when the officers stopped the car in which he had been a passenger. Pet. App. A8-A9 (citing *Brendlin* v. *California*, 127 S. Ct. 2400, 2410 (2007)). It also stated that Officer Trevizo could have "order[ed] [petitioner] out of the car after it had been stopped," *id.* at A11, and it "[a]ssum[ed], without deciding, that [Officer] Trevizo had

reasonable suspicion that [respondent] was armed and dangerous," *id.* at A13-A14.

The majority concluded, however, that respondent's interaction with Officer Trevizo "had evolved into a consensual encounter before [she] patted him down." Pet. App. A9; see *id.* at A14. According to the court, "a reasonable person in [respondent's] position would have felt free to remain in the vehicle." *Id.* at A14. And relying on its own previous decision in *In re Ilono H.*, 113 P.3d 696 (Ariz. Ct. App. 2005), the majority further concluded that "when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purposes of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger without reasonable cause to believe 'criminal activity may be afoot.'" Pet. App. A15-A16 (quoting *Terry* v. *Ohio*, 392 U.S. 1, 30 (1968)); see *id.* at A6. The majority stated that it did "not * * * reach the broader question [of] * * * whether officers, in the interest of their own safety, and based solely on the seizure resulting from the initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous." *Id.* at A15.

b. Judge Espinosa dissented. Pet. App. A17-A23. In his view, the majority erred in equating the pat-down of respondent with a situation in which police simply approach individuals in a park and then conduct a protective search for safety reasons alone. *Id.* at A18-A19 (discussing *Ilono H.*). Unlike in that case, the dissent reasoned, the frisk here "was preceded by a lawful traffic stop based on founded suspicion." *Id.* at A19. And, the dissent believed, respondent was not free to leave at the time of the frisk. *Ibid.* The dissent thus concluded

that "the majority ha[d] interpreted the facts of this case in a less than realistic fashion to essentially conclude that an officer reasonably fearing for her safety during a lawful roadside vehicle stop may not ensure her own safety and that of others present by patting down a suspicious passenger for weapons." *Id.* at A17.

4. The Arizona Supreme Court denied a petition for review. Pet. App. B1-B2.

SUMMARY OF ARGUMENT

The Arizona Court of Appeals erred in concluding that Officer Trevizo's pat-down of respondent violated the Fourth Amendment.

A. "The touchstone of the Fourth Amendment is reasonableness," *United States* v. *Knights*, 534 U.S. 112, 118 (2001), and this Court has repeatedly recognized that traffic stops are "especially fraught with danger to police officers," *Michigan* v. *Long*, 463 U.S. 1032, 1047 (1983). Accordingly, the Court has held that officers may frisk the driver of a lawfully stopped vehicle if they have reasonable suspicion that the driver is armed and dangerous, see *Pennsylvania* v. *Mimms*, 434 U.S. 106, 112 (1977) (per curiam), and it has twice stated in dicta that the same rule applies with respect to passengers, see *Knowles* v. *Iowa*, 525 U.S. 113, 117-118 (1998); *Long*, 463 U.S. at 1047-1048. In *Maryland* v. *Wilson*, 519 U.S. 408 (1997), the Court held that "the rule * * * that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle[] extends to passengers as well," *id.* at 410, and it did so based on the conclusion that the risks to officer safety posed by passengers are every bit as great as those posed by drivers, see *id.* at 413-414. Accordingly, the logic of this Court's cases inexorably produces the conclusion that an officer

may frisk a passenger in a lawfully stopped vehicle if the officer has reasonable suspicion that the passenger is armed and dangerous.

B. The Arizona Court of Appeals erred in concluding that the constitutionality of the frisk in this case turns on whether a reasonable person in respondent's position would have felt free to terminate the encounter at the point when Officer Trevizo asked him to get out of the car. As an initial matter, on the facts of this case, a reasonable person in respondent's position would not have felt free to leave at the time of the frisk. The stop of the car in which respondent was riding effected a seizure of him, and a reasonable person in his position would not have felt "free to depart without police permission." *Brendlin* v. *California*, 127 S. Ct. 2400, 2407 (2007). Nothing transpired during the interval between the initial stop and the frisk that would have communicated to a reasonable person that respondent was at liberty to move about as he pleased. *Ibid.*

In any event, this Court has never held that an officer may not perform a *Terry* frisk of a person reasonably believed to be armed and dangerous simply because the encounter was consensual until the point of the pat-down. To the contrary, the Court has repeatedly made clear that the societal interests in investigating crime and in protecting officer safety are distinct and that officer safety interests may justify certain actions that could not be justified solely to investigate crime.

The Arizona Court of Appeals' observation that police officers, like ordinary citizens, may simply avoid people they reasonably believe to be armed and dangerous is unrealistic. An officer often has the responsibility to enter dangerous situations and to investigate potentially dangerous persons. The court's position also over-

looks the perverse incentives that its rule would give suspects, who could deter the police from approaching simply by arming themselves. In addition, the Arizona Court of Appeals erred in reasoning that a pat-down in a consensual encounter is prohibited because citizens generally have the right to refuse to speak with the police absent reasonable suspicion that they have engaged in unlawful conduct. When an individual chooses instead to remain in the presence of an officer, in a place where the officer has the lawful right to be, the fact that the individual is reasonably suspected of being armed and dangerous justifies the limited intrusion of a frisk for the officer's protection.

C. The rule adopted by the court of appeals would be particularly inappropriate in the context of traffic stops. This Court has repeatedly recognized the unique nature of traffic stops, both in terms of the reduced expectations of privacy enjoyed by drivers and passengers and the risks to officers while conducting such stops. Unlike an officer who initiates an on-the-street encounter, a police officer who makes a traffic stop will often be unable to assess the degree of danger until after making the stop. In addition, once a traffic stop is made, a passenger in a stopped car may pose just as great of a potential safety risk to an officer as the driver of the car. Likewise, an officer has no realistic way of avoiding one of the car's passengers, and the Court has recognized that it would be unreasonable to expect officers who are conducting traffic stops "to allow people to come and go freely" or to "move around in ways that could jeopardize [the officer's] safety." *Brendlin* v. *California*, 127 S. Ct. 2400, 2407 (2007). For that reason, the officer may order the passenger out of the car and, if the facts provide

reasonable suspicion that the individual is armed and dangerous, may conduct a protective frisk.

ARGUMENT

A POLICE OFFICER WHO IS PARTICIPATING IN A LAWFUL TRAFFIC STOP MAY PERFORM A BRIEF PAT-DOWN SEARCH OF ANY PASSENGER WHOM THE OFFICER HAS REASON TO BELIEVE MAY BE ARMED AND DANGEROUS

"[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968); see *United States* v. *Knights*, 534 U.S. 112, 118 (2001) ("The touchstone of the Fourth Amendment is reasonableness."). This Court has repeatedly recognized that traffic stops are "especially fraught with danger to police officers," *Michigan* v. *Long*, 463 U.S. 1032, 1047 (1983), and that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation," *Brendlin* v. *California*, 127 S. Ct. 2400, 2407 (2007) (citations omitted; brackets in original). As a result, officers who conduct traffic stops must have sufficient authority "to search for weapons and protect themselves from danger." *Knowles* v. *Iowa*, 525 U.S. 113, 117 (1998) (citations omitted). Accordingly, the Court has stated that officers who conduct "routine traffic stop[s]" may "perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous." *Id.* at 117-118.

The Arizona Court of Appeals dismissed that clear statement from *Knowles* as "unexplained *dicta*." Pet. App. A15; see *id.* at A10 n.3. It then further concluded that, in situations where a traffic stop has "evolved into

a separate, consensual encounter" with respect to a passenger, a police officer "ha[s] no right" to frisk that passenger for weapons, "even if [the officer] ha[s] reason to suspect [that the passenger is] armed and dangerous," unless the officer also has reasonable suspicion that the passenger has committed or is committing a crime. *Id.* at A14-A15.

That decision is seriously flawed and should be reversed by this Court. A police officer must have the ability to protect the officer's own safety from a person reasonably believed to be armed and dangerous whenever the officer encounters that person in a place where the officer has a lawful right to be. That principle has particular force in traffic stops, where officers inevitably seize passengers along with drivers and thus inevitably encounter dangerous individuals who are not suspected of any particular criminal activity. Accordingly, Officer Trevizo's frisk of respondent was constitutionally reasonable regardless of whether at that point a reasonable person in respondent's position would otherwise have felt free to terminate the encounter and regardless of whether Officer Trevizo had reasonable suspicion that respondent was or had engaged in criminal activity.

A. A Police Officer May Frisk A Passenger During A Routine Traffic Stop If The Officer Has Reasonable Suspicion That The Passenger Is Armed And Dangerous

The Arizona Court of Appeals did not question the lawfulness of the stop of the car in which respondent was a passenger. That stop effectuated a lawful seizure of respondent. See *Brendlin*, 127 S. Ct. at 2403, 2410 (holding that a passenger is seized "from the moment [the] car [comes] to a halt on the side of the road" and thus "may challenge the constitutionality of the stop").

The Arizona Court of Appeals also assumed for purposes of its decision that Officer Trevizo "had reasonable suspicion that [respondent] was armed and dangerous." Pet. App. A13-A14.[1] Those premises alone establish the constitutionality of a frisk for weapons.[2]

1. In *Terry* v. *Ohio*, *supra*, this Court observed that "a perfectly reasonable apprehension of danger may arise long before [a police] officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime." 392 U.S. at 26-27. Noting the large number of law enforcement personnel who have been killed in the line of duty, *id.* at 23-24, the Court stated that "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties," *id.* at 23. Accordingly, the Court held that "there must be a nar-

[1] Respondent has acknowledged that the question upon which this Court granted review "is premised on the claim that [Officer] Trevizo reasonably suspected [respondent] to be armed and dangerous." Br. in Opp. 15; see Pet. i. The question presented further presumes that Officer Trevizo lacked reasonable suspicion that respondent "[was] committing, or ha[d] committed, a criminal offense." Pet. i. The record supports the first proposition and nothing justifies questioning the State's concession on the second proposition. Cf. *United States* v. *Leon*, 468 U.S. 897, 905 (1984) (accepting the court of appeals' conclusion that probable cause for a warrant was absent where the government did not seek review of that holding).

[2] Respondent's assertion that the frisk was constitutionally invalid because Officer Trevizo was not actually motivated by officer safety in performing it, see Br. in Opp. 5, 7, 11, is without merit. "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively*, justify the action. The officer's subjective motivation is irrelevant." *Brigham City* v. *Stuart*, 547 U.S. 398, 404 (2006) (internal quotation marks, brackets, and citation omitted); accord *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996).

rowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." *Id.* at 27; see *id.* at 24. The Court emphasized that "[t]he officer need not be absolutely certain that the individual is armed" and that "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 27.

In *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (per curiam), this Court held that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Id.* at 111 n.6. The Court concluded that the government's "legitimate and weighty" interest in officer safety outweighed the "*de minimis*" additional intrusion of requiring a driver who has already been lawfully stopped to exit the car. *Id.* at 110-111. Then, applying the principles announced in *Terry*, the Court further held that a driver who has exited the vehicle may be patted down for weapons if a reasonable officer could conclude that the driver is "armed and thus pose[s] a serious and present danger to the safety of the officer." *Id.* at 112.

In *Maryland* v. *Wilson*, 519 U.S. 408 (1997), the Court held that "the rule * * * that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle[] extends to passengers as well." *Id.* at 410; see *id.* at 415. The Court acknowledged that whereas "[t]here is probable cause to believe that the driver has committed a minor vehicular offense, * * * there is no such reason to stop or detain the passengers." *Id.* at 413. But the Court emphasized that

"traffic stops may be dangerous encounters," *ibid.*, and it stated "that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop," *id.* at 414. As a result, the Court concluded that "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger." *Id.* at 413.

2. As this Court stated in *Knowles*, see 525 U.S. at 117-118, *Terry*, *Mimms*, and *Wilson* together establish that a police officer who is conducting a routine traffic stop may always order a passenger to get out of the car and may perform a brief pat-down search for weapons if the officer has reasonable suspicion that the passenger is armed and dangerous. *Terry* explains that a police officer's "more immediate interest * * * in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him" is distinct from the more general "governmental interest in investigating crime." 392 U.S. at 23; see *id.* at 26-27. *Wilson* states that a passenger's "motivation * * * to employ violence" is "every bit as great as that of the driver," 519 U.S. at 414, and it expressly equates drivers and passengers for purposes of a police officer's ability to order them out of the car "as a matter of course," *id.* at 410. Drivers and passengers should therefore be treated the same on the related issue of whether, once a person is out of a stopped car, an officer may perform a brief pat-down in order to protect the officer's own safety. See *Long*, 463 U.S. at 1047-1048 (stating in *dicta* that *Mimms* "held that police may order *persons* out of an automobile during a stop for a traffic violation, and may

frisk *those persons* for weapons if there is a reasonable belief that *they* are armed and dangerous") (emphases added).

As was the case with drivers in *Mimms*, the Court "need not * * * go so far as to suggest that an officer may frisk [the passengers] of any car stopped for a traffic violation." 434 U.S. at 110 n.5. Instead, the Court need only apply in this particular context *Terry*'s "controll[ing]" holding that an officer may conduct a protective frisk in circumstances where the officer could reasonably conclude that a person with whom the officer is dealing "[i]s armed and thus pose[s] a serious and present danger to the safety of the officer." *Id.* at 111-112.[3] The courts of appeals that have confronted that specific question have uniformly held that a police officer may perform a pat-down search of a passenger who has been ordered out of a car as part of a lawful traffic stop if the officer has reasonable suspicion that the passenger is armed and dangerous.[4]

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[3] Although this Court has analogized traffic stops to *Terry* stops for certain purposes, see *Knowles*, 525 U.S. at 117; *Long*, 463 U.S. at 1051; *Mimms*, 434 U.S. at 110-112, it has taken care to avoid "suggest[ing] that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Berkemer* v. *McCarty*, 468 U.S. 420, 439 n.29 (1984). Because the police conduct in this case was fully consistent with *Terry*, the Court need not determine how much additional latitude officers possess during a stop that is supported by probable cause.

[4] See, *e.g.*, *United States* v. *Soares*, 521 F.3d 117, 119-122 (1st Cir. 2008); *Holeman* v. *City of New London*, 425 F.3d 184, 191-192 (2d Cir. 2005); *United States* v. *Moorefield*, 111 F.3d 10, 13-14 (3d Cir. 1997); *United States* v. *Colin*, 928 F.2d 676, 678 (5th Cir. 1991); *United States* v. *Montgomery*, 377 F.3d 582, 586 (6th Cir. 2004), cert. denied, 543 U.S. 1167 (2005); *United States* v. *Hernandez-Rivas*, 348 F.3d 595, 599 (7th Cir. 2003); *United States* v. *Woodall*, 938 F.2d 834, 837 (8th Cir. 1991);

B. The Arizona Court Of Appeals' Conclusion That Respondent Was No Longer Seized At The Time Of The Frisk Does Not Warrant A Different Result

The Arizona Court of Appeals concluded that it need not decide "whether officers, in the interest of their own safety, and based solely on the seizure resulting from [an] initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous." Pet. App. A15. Instead, the court held that the "initial lawful seizure of [respondent] incident to the traffic stop of the driver [had] evolved into a separate, consensual encounter" by the time Officer Trevizo asked respondent to step out of the car. *Id.* at A14. The court then further held that, under those circumstances, the Fourth Amendment barred Officer Trevizo from conducting a pat-down search for weapons unless she also had reasonable suspicion that respondent was or had engaged in criminal activity. *Id.* at A6, A14-15.

The court of appeals' reasoning is incorrect. The question whether a particular encounter is consensual involves whether a reasonable person in the position of the person with whom an officer is dealing would feel free to terminate the encounter and depart the scene without interference by the officer. See, *e.g.*, *Brendlin*, 127 S. Ct. 2405-2406; *Florida* v. *Bostick*, 501 U.S. 429, 435-436 (1991). The answer to that question, however, has no bearing on whether a police officer who is in a place where the officer has lawful authority to be may

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United States v. *Vaughan*, 718 F.2d 332, 335-336 (9th Cir. 1983); *United States* v. *Dennison*, 410 F.3d 1203, 1211 (10th Cir.), cert. denied, 546 U.S. 955 (2005); see also *United States* v. *Howard*, 151 Fed. Appx. 221, 224 (4th Cir. 2005) (per curiam), cert. denied, 546 U.S. 1145 (2006).

take appropriate steps to protect the officer's own safety. Rather, Officer Trevizo's "legitimate and weighty" (*Mimms*, 434 U.S. at 110) interest in protecting herself from a person she had reasonable suspicion was armed and dangerous had the same urgency regardless of whether a reasonable person in respondent's position would have felt free to leave or whether Officer Trevizo also had reasonable suspicion that respondent was or had engaged in criminal activity.

1. As an initial matter, the Arizona Court of Appeals' conclusion that respondent was no longer seized when Officer Trevizo frisked him is legally incorrect. In *Brendlin*, this Court stated that "any reasonable passenger" would understand that, once a car is stopped, "no one in the car [is] free to depart without police permission." 127 S. Ct. 2406-2407. The court of appeals was correct that an involuntary detention may evolve into a consensual interaction, see Pet. App. A9, but its opinion fails to demonstrate that that is what occurred here.

First, the court stated that the interaction had been "cooperative" until Officer Trevizo frisked respondent and that "her questions to him were wholly unrelated to the purpose of the traffic stop." Pet. App. A11. But police officers are obviously not required to adopt a hostile tone with people they have detained, and this Court has held that officers may ask questions that are unrelated to the justification for an initial seizure so long as they do not prolong the seizure's length. See *Muehler* v. *Mena*, 544 U.S. 93, 100-101 (2005). Second, the court of appeals cited Officer Trevizo's testimony about her purposes in speaking with respondent and her opinion about whether respondent could have refused her request to get out of the car. Pet. App. A8-A9. But the test for whether a person has been or remains seized is an "ob-

jective" one and does not depend on "the motive of the police for taking" certain actions or the "subjective" beliefs of individual officers. *Brendlin*, 127 S. Ct. at 2408-2409. Finally, the court of appeals noted that "neither [Officer] Trevizo nor the other officers ordered all the occupants to get out of the vehicle during the traffic stop for officer safety reasons" and that "the front seat passenger remained in the car throughout the encounter." Pet. App. A12. The court of appeals did not explain how those facts would have conveyed to a reasonable person in respondent's position that he was "free to decline [Officer Trevizo's] request[]" that he get out of the car, *Brendlin*, 127 S. Ct. at 2406 (citation omitted), and there is no apparent reason why they would have done so.

Because, as *Brendlin* recognizes, the stop of a car communicates to a reasonable passenger that the passenger is not free to terminate the encounter with the police and move about at will, an officer must take some action to communicate to the passenger that the passenger is free to leave. Nothing occurred in this case that would have sent that message.[5]

2. a. In any event, this Court has never held that a police officer's ability to conduct a *Terry* frisk is contingent upon the officer having reasonable suspicion that a person with whom the officer is dealing has committed or is committing a crime. To the contrary, the Court has repeatedly reaffirmed the basic principle that it is constitutionally reasonable for officers who have reasonable

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[5] The question whether respondent remained seized at the time of the frisk appears "fairly included [with]in" (Sup. Ct. R. 14.1(a)) the question upon which the Court granted review. See Pet. i. If the Court were to disagree with the Arizona Court of Appeals' resolution of that issue, the question would still remain whether the frisk was consistent with the Fourth Amendment. It was. See pp. 9-13, *supra*.

concerns for their own safety to take protective measures.

The Court's opinion in *Terry* does not state that an officer's ability to conduct a pat-down is limited to situations where the officer has reasonable suspicion that a potentially armed and dangerous person is committing or has committed a crime. *Terry* applied the Fourth Amendment's general reasonableness standard to "two independent actions, each requiring separate justifications." *United States* v. *Flippin*, 924 F.2d 163, 165 n.2 (9th Cir. 1991). First, *Terry* concluded that a police officer may make an investigatory stop—that is, halt a person's movement and require the person to remain in the officer's presence for a brief period—so long as the officer has reasonable suspicion that the person is engaging, or has engaged, in criminal activity. 392 U.S. at 21, 30-31. Second, the Court held that, even "in situations where [an officer] may lack probable cause for an arrest," the officer may perform a limited pat-down search for weapons "where he has reason to believe that he is dealing with an armed and dangerous individual." *Id.* at 24, 27. In so holding, the Court specifically distinguished between "the governmental interest in investigating crime"—the justification for an investigatory stop—and a police officer's "more immediate interest * * * in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him"—the justification for a frisk. *Id.* at 23. In short, "*Terry* did not cabin the use of officer safety patdowns to lawful investigatory detentions." *United States* v. *Orman*, 486 F.3d 1170, 1173 (9th Cir. 2007).

This Court's post-*Terry* decisions have reiterated that an officer's interest in protecting the officer's own

safety is distinct from—and may justify actions that could not be supported by reference to—the general societal interest in investigating crime. In *Michigan* v. *Summers*, 452 U.S. 692 (1981), for example, the Court described *Terry* as having "approved a 'frisk' for weapons as a justifiable response to an officer's reasonable belief that he *was dealing with* a possibly armed and dangerous suspect." *Id.* at 698 (emphasis added); see *Ybarra* v. *Illinois*, 444 U.S. 85, 93 (1979) (stating that, under *Terry*, "a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted"). In *Michigan* v. *Long*, *supra*, the Court stated that its decisions establish "that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger," 463 U.S. at 1049, and it applied that principle to hold that officers may perform a protective sweep of those places in a vehicle's passenger compartment that may conceal a weapon whenever they have a reasonable belief that the driver of the vehicle poses a danger, *id.* at 1045-1051.

In *Maryland* v. *Buie*, 494 U.S. 325 (1990), the Court held that police officers who have apprehended the subject of an arrest warrant within a home may conduct a protective sweep of any areas that they have reasonable suspicion may "harbor[] an individual posing a danger to the officer or officers." *Id.* at 327. The Court acknowledged that, once the subject of the warrant has been found, "the search for him [i]s over, and there [i]s no longer that particular justification for entering any rooms that ha[ve] not yet been searched." *Id.* at 333. But the Court stated that officers possess an independent interest "in taking steps to assure themselves that

the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." *Ibid.* And the Court said nothing to suggest that a police officer's entitlement to frisk someone the officer encounters during a *Buie* sweep turns on whether the officer has reasonable suspicion that the person has committed a crime. To the contrary, the *Buie* Court described *Terry* and *Long* as having been "concerned with the immediate interest of the police officers in taking steps to assure themselves that the persons *with whom they were dealing* were not armed with, or able to gain immediate control of, a weapon that could unexpectedly and fatally be used against them." *Ibid.* (emphasis added).

This Court's decision in *Mimms* further undermines the Arizona Court of Appeals' conclusion that a police officer's ability to conduct a pat-down search for weapons depends on whether there is "reasonable cause to believe the suspect may have committed a crime." Pet. App. A15. Nothing about the process of writing a citation for a minor traffic violation would ordinarily require ordering the driver to get out of the car. Yet this Court made clear in *Mimms* that an officer's ability to impose that "incremental intrusion" (434 U.S. at 109) does not depend on whether the "objective observable facts * * * support a suspicion that criminal activity [is] afoot." *Id.* at 108 (citation omitted).

b. In addition, the Arizona Court of Appeals' conclusion that the constitutionality of the frisk in this case depends on whether respondent was still at that point seized as part of the initial traffic stop cannot be reconciled with this Court's decision in *Wilson*. The question in *Wilson* was whether an officer may order a passenger to exit a stopped vehicle in the absence of reasonable

suspicion as to the passenger. Although the Court stated that "as a practical matter, the passenger[] [is] already stopped by virtue of the stop of the vehicle," 519 U.S. at 413-414, the Court found it unnecessary in *Wilson* to decide whether a passenger is "seized" as a constitutional matter when the car is initially pulled over. See *Brendlin*, 127 S. Ct. at 2406 (stating that the Court's previous decisions had not "squarely answered" that question). An officer's entitlement to order the driver and passengers out of a stopped car and to conduct a *Terry* frisk are justified by precisely the same interest: ensuring the safety of those to whom society entrusts enforcement of its laws. Yet, under the Arizona Court of Appeals' view, an officer's ability to conduct the frisk would turn on precisely the same question—that is, whether a passenger is "seized" at a given point during a traffic stop—that the Court found unnecessary to reach in order to resolve the former issue in *Wilson*.

c. None of this Court's other decisions is to the contrary. In *United States* v. *Place*, 462 U.S. 696 (1983), the Court noted that *Terry* "implicitly acknowledged the authority of the police to make a *forcible stop* of a person when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." *Id.* at 702. In support of that reading of *Terry*, the Court quoted language from Justice Harlan's concurring opinion that argued that police officers must be entitled to make a forcible stop based on less than probable cause because, in Justice Harlan's view, "if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop." *Id.* at 702 n.4 (quoting *Terry*, 392 U.S. at 32 (Harlan, J., concurring)). But the

Court was not required to, and did not, adopt that gloss on *Terry*'s holding in order to decide *Place*, because the defendant in *Place* had "refused to consent" to either his luggage's initial detention or its subsequent search. *Id.* at 699.

The same is true of *Adams* v. *Williams*, 407 U.S. 143, 146 (1972), and *Florida* v. *J.L.*, 529 U.S. 266, 272, 274 (2000). *Adams* did not state that an officer is entitled to conduct a pat-down *only* "[s]o long as the officer is entitled to make a forcible stop," 407 U.S. at 146, and the Court expressly noted that the government had not argued that the pre-frisk encounter in that case had been consensual, *id.* at 146 n.1. Consent was similarly not at issue in *J.L.*, because the approaching officers ordered the defendant to place his hands on a wall and immediately frisked him. 529 U.S. at 268; see *id.* at 274 ("We speak in today's decision only of cases in which the officer's authority to make the initial *stop* is at issue") (emphasis added).

3. The Arizona Court of Appeals and other courts that have reached the same conclusion have offered several arguments in support of the view that it is constitutionally unreasonable for a police officer to "conduct a pat-down search during a consensual encounter if the officer lacks reasonable suspicion that criminal activity is occurring, even if the officer has reason to believe a suspect may be armed and dangerous." Pet. App. A6. None is persuasive.

First, the court of appeals reasoned that because "[a]ny person, including a policeman, is at liberty to avoid a person he considers dangerous," a police officer may simply refrain from approaching a potentially armed and dangerous individual unless the officer also has reasonable suspicion that the person has committed

or is committing a criminal offense. Pet. App. A8 (quoting *Terry*, 392 U.S. at 32 (Harlan, J., concurring)); see *In re Ilono H.*, 113 P.3d 696, 700 (Ariz. Ct. App. 2005). The court of appeals made no effort to explain, however, how that principle would work in practice when a potentially dangerous individual—for example, a person who appears to be a bodyguard or, for that matter, a passenger in a car—remains in the immediate vicinity of a person, such as the driver, whom the officer reasonably suspects of specific criminal activity. The officer cannot choose to avoid the passenger without abandoning the officer's legitimate investigatory pursuit of the driver, which is plainly an unreasonable outcome.[6]

More fundamentally, the argument that police officers can simply avoid dangerous people ignores the nature of an officer's job. "Asking questions is an essential part of police investigation," *Hiibel* v. *Sixth Judicial Dist. Ct.*, 542 U.S. 177, 185 (2004), and good police work will often require an officer to venture into places or situations that private citizens might sensibly choose to avoid. Because "consensual encounter[s] * * * implicate[] no Fourth Amendment interest," *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam), the rule

[6] Nor can the officer solve the problem by ordering the passenger to leave the area. A passenger whom the officer reasonably suspects of being armed and dangerous cannot be trusted to obediently leave the scene. (Nor, even if the passenger would leave the scene, would it be good police work to order a person reasonably believed to be armed and dangerous to go back into society at large.) And officers should not have to divert their attention from the business of a traffic stop to monitor the activities and movements of passengers who were ordered to disperse but may choose to return. Cf. *Brendlin*, 127 S. Ct. at 2407 ("[T]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.") (citation omitted).

adopted by the court of appeals would encourage those who wish to avoid any contact with the police to arm themselves so as to deter officers from approaching them in the absence of particularized suspicion of unlawful conduct. This Court has previously refused to construe the Fourth Amendment to create precisely those sorts of "perverse incentives." *Scott* v. *Harris*, 127 S. Ct. 1769, 1779 (2007); see *ibid.* (declining "to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger"). Cf. *California* v. *Hodari D.*, 499 U.S. 621, 627 (1991) (stating that because "[s]treet pursuits always place the public at some risk, * * * compliance with police orders to stop should therefore be encouraged").

Second, the Arizona Court of Appeals reasoned that permitting a brief pat-down search for weapons in the absence of reasonable suspicion of criminal wrongdoing would be "inconsistent with" the principle that "a person is allowed to disregard or flee from a consensual encounter with law enforcement officers." Pet. App. A7-A8; see *Ilono H.*, 113 P.3d at 700; see also *Terry*, 392 U.S. at 33 (Harlan, J., concurring); *United States* v. *Gray*, 213 F.3d 998, 1000 (8th Cir. 2000). Citizens may as a general matter decline to interact with a police officer in the absence of reasonable suspicion that they have engaged or are engaging in criminal wrongdoing. A person who has consented to speak with an officer may also—in the absence of reasonable suspicion—choose to terminate the encounter and depart the scene in a manner that does not threaten the safety of the officer or others in the vicinity. But neither of those propositions establishes that a person whom an officer has reason to believe may be armed and dangerous has a right *both* to remain in

the presence of an officer in a place where the officer has lawful authority to be *and* to be immune from a limited pat-down search designed to ensure the officer's safety. Such a rule would compel police officers either to retreat from places where they have lawful authority to be or to expose themselves to unreasonable risks.

Finally, some courts have emphasized that, whereas a consensual encounter does not implicate the Fourth Amendment at all, "[a] protective frisk is both a search and a seizure for Fourth Amendment purposes." *Gray*, 213 F.3d at 1000; see *State* v. *Giltner*, 537 P.2d 14, 16 (Haw. 1975). But the Fourth Amendment does not say that searches and seizures may be conducted only for the purpose of investigating crime. Rather, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985); see *Florida* v. *Jimeno*, 500 U.S. 248, 250 (1991); *Terry*, 392 U.S. at 19. And this Court has repeatedly recognized that the compelling interest in officer safety will sometimes make it constitutionally reasonable for police officers to take actions that cannot be justified by reference to society's more general interest in enforcing the criminal law. See pp. 12-13, 16-19, *supra*; see also *Brigham City* v. *Stuart*, 547 U.S. 398, 400 (2006) (holding that "police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury").

C. Traffic Stops Provide A Particularly Compelling Context For Recognizing An Officer's Authority To Frisk A Suspicious Passenger Who Remains On The Scene

For the reasons stated above, the Arizona Court of Appeals erred in concluding that a police officer's ability to frisk a person whom the officer has reasonable suspicion is armed and dangerous turns on whether the officer's encounter with that person has been consensual until the point of the frisk and, if so, whether the officer nonetheless has reasonable suspicion that the person has committed or is committing a crime. In any event, such a rule would be especially unwarranted in the particular context of traffic stops.

This Court has long noted that "[p]assengers, no less than drivers, possess a reduced expectation of privacy" when traveling in cars. *Wyoming* v. *Houghton*, 526 U.S. 295, 303 (1999). An automobile "seldom serves as one's residence or as the repository of personal effects," and it "travels public thoroughfares where both its occupants and its contents are in plain view." *New York* v. *Class*, 475 U.S. 106, 112-113 (1986) (citation omitted). A person's reasonable expectation of privacy when traveling in a car is further diminished by the government's "pervasive regulation" of automobiles, *id.* at 113, and by the possibility of "traffic accidents that may render all [of a car's] contents open to public scrutiny," *Houghton*, 526 U.S. at 303.

In addition, traffic stops differ from on-the-street encounters in numerous respects. This Court has repeatedly recognized that traffic stops "are especially fraught with danger to police officers," *Long*, 463 U.S.

at 1047,[7] and an officer who makes a traffic stop will often be unable to assess the degree of danger until after making the stop. The officer may have difficulty determining how many people are in a vehicle before it has come to a halt on the side of the road. See *Wilson*, 519 U.S. at 414 (stating that the "danger to an officer * * * is likely to be greater when there are passengers in addition to the driver"). The vehicle's body and seats may make it impossible to detect weapons or other indicia of danger until the officer reaches the car. And whereas an officer who wishes to approach a particular person in a public place could, at least in certain circumstances, wait until that person is no longer in the company of another person whom the officer considers armed and dangerous, a police officer cannot realistically avoid a passenger in a lawfully stopped vehicle.

The Court has already recognized that the degree of danger posed by a passenger during a traffic stop does not depend on whether the officer has reason to believe that the passenger has committed a crime. See *Wilson*, 519 U.S. at 413-414. The degree of danger posed by a particular passenger likewise bears no necessary relationship to whether a reasonable person in the passenger's position would feel free to terminate the portion of the encounter that involves the passenger or whether a

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[7] See *Brendlin*, 127 S. Ct. at 2407; *Wilson*, 519 U.S. at 413; *Long*, 463 U.S. at 1047, 1052; *Summers*, 452 U.S. at 702-703; *Mimms*, 434 U.S. at 110; *United States* v. *Robinson*, 414 U.S. 218, 233-234 & n.5 (1973); *Adams*, 407 U.S. at 148 n.3. Statistics maintained by the FBI show that, in 2006 alone, 6490 law enforcement officers were assaulted and eight officers were killed during traffic pursuits and stops. See Federal Bureau of Investigation, Department of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted, 2006*, tbls. 23 & 66 (Oct. 2007), <www.fbi.gov/ucr/killed/2006/index.html>.

passenger who exits the vehicle does so voluntarily or at the direction of the officer. Danger may still exist even when an encounter has become consensual and no other crime is suspected, as this Court has recognized. Cf. *Long*, 463 U.S. at 1050 ("If a suspect is 'dangerous,' he is no less dangerous simply because he is not arrested.").

This case illustrates the point. Respondent's continued observation of the officers as they approached, his apparent gang colors, his possession of a portable scanner useful to intercept police band communications, his prior conviction, and his residence in a place known for a particular gang, J.A. 12, 16-21, reasonably led a trained officer to be concerned for her safety, even though she could not put her finger on particular criminal activity in which he was involved, J.A. 36. In that situation, an officer must be permitted to conduct a frisk to protect against sudden deployment of a weapon. Indeed, the Arizona Court of Appeals' decision would create the absurd result that a passenger who, after the completion of a traffic stop, exits the car and begins moving towards an officer in a manner that the officer reasonably perceives to be threatening could not be frisked for weapons unless the officer also has reasonable suspicion that the passenger has already committed a crime.

This Court's decision in *Brendlin* further underscores that there are important differences between traffic stops and on-the-street encounters. In *Brendlin*, the Court held that a passenger is "seized" for Fourth Amendment purposes when an officer stops the car in which the passenger is traveling. 127 S. Ct. at 2403. In reaching that conclusion, the Court stated that a reasonable person in the passenger's position "would not expect a police officer to allow people to come and go

freely from the physical focal point of an investigation into faulty behavior or wrongdoing" or "let people move around in ways that could jeopardize [the officer's] safety." *Id.* at 2407. The Arizona Court of Appeals' opinion, however, is expressly premised on the notion that, because the encounter had become consensual, Officer Trevizo was constitutionally required to give respondent an opportunity to depart the scene after he exited the vehicle *without* first ensuring that, in so doing, she was not permitting a dangerous person to get behind her. Such a regime would be a far cry from the "unquestioned command of the situation" that this Court has stated will best minimize "[t]he risk of harm to both the police and the occupants" of a stopped car. *Ibid.* (citations omitted; brackets in original).

CONCLUSION

The judgment of the Arizona Court of Appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States
October Term, 2008

STATE OF ARIZONA,
Petitioner,

vs.

LEMON MONTREA JOHNSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

BRIEF AMICI CURIAE of AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, THE NATIONAL SHERIFFS' ASSOCIATION, THE ARIZONA LAW ENFORCEMENT LEGAL ADVISORS' ASSOCIATION and THE ARIZONA ASSOCIATION OF CHIEFS OF POLICE, IN SUPPORT OF PETITIONER.

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INTEREST OF *AMICI CURIAE*

This brief is filed pursuant to Rule 37 of the United States Supreme Court. Timely notice of intent to file this brief has been served upon Counsel for each party. Consent to file has been granted by Counsel for the Petitioner and Counsel for the Respondent. Letters of consent of the Petitioner and Respondent have been filed with the Clerk of this Court, as required by the Rules.[1]

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various state and federal constitutions.

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: this brief was authored for the *amici* by James P. Manak, Esq., Counsel of Record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc. made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), was founded in 1893 and is the largest organization of police executives and line officers in the world. IACP's mission, throughout the history of the association, has been to identify, address and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America. It conducts programs of training, publications and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The Arizona Law Enforcement Legal Advisors' Association (ALELAA) is an association of attorneys who advise and represent local, state and federal law

enforcement agencies. The Arizona Association of Chiefs of Police (AACP) is an association of all of the municipal chiefs of police in Arizona. Both organizations have a keen interest in any legislation, court decision or statement of public policy that affects the authority, effectiveness, safety and welfare of law enforcement officers in the State of Arizona. The members of the ALELAA also provide a large portion of basic and advanced legal training to Arizona law enforcement officers. The decision of the court below has an adverse effect on the effectiveness and safety of law enforcement officers in Arizona as well as other states. These organizations seek to assist this Court by providing their analysis of the issues and a broader look at the risk to police officers presented by the decision in this case.

Amici are national and state associations representing the interests of law enforcement agencies at the national, state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of formulating rules and policies on traffic stops of vehicles and the safety of police officers in conducting their sworn duties; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law

enforcement officers and administrators in connection with such matters, including the formulation and implementation of training and policies on the subject.

Because of the relationship with our members and the composition of our membership and directors, including active law enforcement administrators and counsel, we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

This brief concentrates on policy issues, including the importance of effective rules and procedures for conducting stops of vehicles and the protection of law enforcement officers from injury and death as they perform their duties. Although the parties clearly are represented by capable and diligent counsel, no single party can completely develop all relevant views of such policy issues as these, especially the issue of officer safety in conducting vehicle stops and interacting with drivers and passengers.

STATEMENT OF THE CASE

Defendant was convicted of criminal possession of a weapon and possession of marijuana. At a suppression hearing officer Maria Trevizo testified that she was a member of the Arizona state gang task force. She had attended basic and advanced training in gang enforcement and had two years of on-the-job experience. She was on patrol with two other members of the gang task force in an area of Tucson, Arizona, known for gang activity by a street gang known as "Crips." Crips gang members, she testified, were known to possess guns.

The task force members initiated a traffic stop on a vehicle for an insurance violation. The vehicle had three occupants. While officer Trevizo approached the vehicle on foot, she noticed defendant, the backseat passenger, look back at the police car, say something to the people in the front seat, and then maintain eye contact with the officers. She testified that this was unusual behavior because in her experience people normally look front during a traffic stop. While her partner made contact with the driver, Trevizo made contact with defendant. The occupants of the car denied that there were any weapons in the vehicle. Defendant had no identification with him, but had a police scanner in his jack-

et pocket. Trevizo testified this ". . . caused me concern because most people don't carry around a scanner in their jacket pocket unless they're going to be involved in some kind of criminal activity or going to try to evade the police by listening to the scanner."

Officer Trevizo also noted defendant's blue shirt, shoes, and bandanna. She knew that members of the Crips gang show their gang affiliation by wearing blue clothing. She testified that there was particular significance in defendant's bandanna because bandannas in gang colors are an identification for the gang.

While defendant was seated in the back seat, he volunteered that he was from Eloy, Arizona. Trevizo knew from experience in gang interdiction that the predominant street gang in Eloy was the "Trekkle Park Crips." Johnson also told Trevizo that he had a criminal record. She asked Johnson to exit the vehicle, intending to speak with him away from the other occupants of the car to gather intelligence about his gang. She testified that in her opinion Johnson was free to refuse to exit the vehicle. Once Johnson was out of the vehicle, she asked him to turn around because she was going to pat him down. She said she did this solely for reasons of officer safety, "because I had a lot of information that

would lead me to believe he might have a weapon on him." She stated that the search was solely because of her concern for her safety. She patted down defendant's exterior clothing and felt the butt of a handgun in his pants' waist. He was arrested and a subsequent search of his person incident to arrest produced marijuana on his person. The driver was outside the car during the encounter between Trevizo and defendant.

Officer Trevizo testified that the following factors led her to suspect that defendant might have a gun: (1) he watched the officers as they approached the vehicle instead of looking front, like most traffic stop subjects; (2) he did not have identification; (3) he had a scanner in his pocket; (4) he was wearing blue Crips colors; (5) the traffic stop took place near a known Crips area; (6) he told her he was a convicted felon; and (7) he told her he was from Eloy, and she knew the Crips were a dominant gang in Eloy. She testified that it was the totality of these circumstances that contributed to her concern for her safety. The trial court denied the motion to suppress.

Defendant was convicted but his conviction was reversed by the Arizona Court of Appeals, *State v. Johnson*, 217 Ariz. 58, 170 P.3d 667 (App.Div. 2, 2007). Two

judges of the Court of Appeals held that defendant was seized pursuant to a lawful traffic stop of the driver, but that officer Trevizo's encounter with Johnson had "evolved" from an investigative stop to a consensual encounter when defendant exited the back seat of the vehicle to talk with officer Trevizo. The majority held that "when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purpose of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger without reasonable cause to believe 'criminal activity may be afoot,'" quoting *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868 (1968).

One judge dissented, concluding that "[v]iewing the evidence under the totality of the circumstances realistically and in light favorable to upholding the trial court's determination, Trevizo was lawfully in defendant's presence, the encounter was nonconsensual, and the officer had a reasonable basis to consider him dangerous and therefore conduct a brief pat down of his person."

SUMMARY OF ARGUMENT

In the context of a vehicle stop for a traffic violation, an officer may conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger is armed and presently dangerous, even if the officer lacks reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense. The decision below, if affirmed, would prevent a search for weapons based on reasonable officer safety concerns--creating an unworkable, impractical, and dangerous precedent for vehicle stops--and deter officers from acting with appropriate caution when conducting legitimate traffic stops, with the result that officers' lives will be unreasonably endangered.

ARGUMENT

IN A VEHICLE STOP A POLICE OFFICER MAY CONDUCT A PAT-DOWN SEARCH OF A PASSENGER WHEN THE OFFICER HAS AN ARTICULABLE BASIS TO BELIEVE THE PASSENGER IS ARMED AND PRESENTLY DANGEROUS, EVEN IF REASONABLE GROUNDS TO BELIEVE THAT THE PASSENGER IS COMMITTING, OR HAS COMMITTED, A CRIMINAL OFFENSE IS LACKING; THE BALANCING OF THE STATE'S INTEREST AND THE PASSENGER'S PRIVACY INTEREST FALLS ON THE SIDE OF THE STATE DUE TO THE LEGITIMATE AND WEIGHTY CONCERN FOR THE SAFETY OF LAW ENFORCEMENT

OFFICERS WHEN THERE IS AN ARTICULABLE BASIS FOR OFFICERS TO BELIEVE A PASSENGER MAY BE ARMED AND DANGEROUS, AND IN VIEW OF THE UNIQUE DANGERS THAT SUCH STOPS POSE AS DOCUMENTED BY STATISTICS.

Amici will not repeat the legal arguments put forward by the Petitioner in this case; we do, however, support them. As national and state representatives of law enforcement officers, administrators and legal advisors, we wish to inform the Court of the following policy considerations from our professional perspective.

This Court and others have long recognized that traffic stops are an inherently dangerous situation for police officers and suspects. *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2137 (2004) (a custodial arrest and incidental search of a vehicle is fluid and the danger to the police officer flows from the fact of the arrest and its attendant proximity, stress, and uncertainty); *Maryland v. Wilson*, 519 U.S. 408, 413, 117 S.Ct. 882 (1997) ("Regrettably, traffic stops may be dangerous encounters . . . the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer."); *Michigan v. Long*, 463 U.S. 1032, 1048, 103 S.Ct. 3469 (1983) (noting ". . . inordinate risk confronting an officer as he

approaches a person seated in an automobile."); *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 98 S.Ct. 330 (1977) ("Indeed, it appears that a significant percentage of murders of police officers occurs when the officers are making traffic stops."); *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323 (9th Cir. 1995) (investigative detentions involving suspects in vehicles are especially fraught with danger to police officers); *United States v. Flores*, 359 F.Supp.2d 871, 876 (D.Ariz. 2005) (". . . dangerous situations can arise if recently stopped persons are allowed to confer out of his [officer's] presence."); *State v. Ochoa*, 189 Ariz. 454, 943 P.2d. 814, 822 (App.Div. 1, 1997) ("Nor does the fact that an investigating officer may have the person 'under his control' diminish the vulnerability of the officer . . ."); *State v. Webster*, 170 Ariz. 372, 824 P.2d 768, (App.Div. 2, 1991) (the court noted the risks that police officers confront when making traffic stops and agreed that the safety of the police officer is a legitimate and weighty concern).

In order to protect themselves from assaultive conduct of drivers and passengers, police officers can rely upon the protections of *Terry v. Ohio* to perform pat downs based upon reasonable suspicion that the subject is armed and dangerous to the officer. Such protection should

apply whether the subject is in a consensual relationship or a detention. The objective in either situation is protection of the officer based on the facts.

Determining which police-citizen contacts fall within the protection of the Fourth Amendment is a fact intensive determination and turns on the unique circumstances of each case. See *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968) ("[T]he police officer must be able to point to specific and articulable facts"); *Sibron v. New York*, 392 U.S. 40, 64, 88 S.Ct. 1889 (1968) (the officer "must be able to point to particular facts"; *United States v. Griffith*, http://caselaw.lp.findlaw.com/data2/circs/8th/071734p.pdf (No. 07-1734, 8th Cir. 7-21-08, p. 5).

In determining whether an officer has a reasonable suspicion of a threat to her personal safety the courts have considered the training and experience of the officer. See *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744 (2002) ("This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person."); *People v. Frank*, 233 Cal.App.3d 1232, 1240 (1991); *United States*

v. Barlin, 686 F.2d 81, 86 (2nd Cir. 1982) ("[W]e must view the surrounding circumstances . . . through the eyes of a reasonable and cautious police officer on the scene guided by his training and experience."); *United States v. Rideau*, 969 F.2d 1572, 1575 (5th Cir. 1992) ("Trained, experienced officers like Ellison may perceive danger where an untrained observer would not.").

In the instant case the police officer knew the following facts, based on her observations, experience and training: (1) defendant watched the officers as they approached the vehicle instead of looking front like most traffic stop subjects; (2) he did not have identification; (3) he had a scanner in his pocket; (4) he was wearing blue Crips street gang colors; (5) the traffic stop took place near a known Crips area; (6) he told her he was a convicted felon; (7) defendant told her he was from Eloy, and she knew the Crips were a dominant gang in Eloy; (8) the officer had been trained in gang enforcement and had two years on-the-job experience dealing with gangs; and (9) the officer knew that gang members usually were armed. Based on all these facts, the officer testified that it was the totality of these circumstances that contributed to her concern for her safety and prompted her to do a protective frisk for weapons.

Not to be overlooked in this equation for finding reasonable suspicion for the frisk, was the defendant's reasonably perceived (by the officer) gang membership. In *United States v. Garcia*, 459 F.3d 1059 (10th Cir. 2006), a court upheld the frisk of the defendant in part because he was a known gang member, and the officer testified that, "based on his training and experience he knew that guns are often part of the gang environment." The court noted: "In our society today this observation resonates with common sense and ordinary human experience." 459 F.3d at 1066. See also, *People v. King*, 216 Cal.App.3d 1237, 1241 (1989) ("[D]etention of a known gang member would increase the likelihood of harm to an officer and further justify a search for weapons."); *People v. Guillermo M.*, 130 Cal.App.3d 642, 644 (1982) ("The agent knew that appellant had been in trouble before and associated with a gang."); *United States v. Osbourne*, 326 F.3d 274, 278 (1st Cir. 2003) (defendant "was a member of a violent street gang").

Amici submit that there is no room for doubt that in the instant case the officer had reasonable suspicion to believe she was in danger and needed to protect herself, whether this was a "consensual encounter" or an "investigative detention." To have failed to do so might have cost the officer her life or serious

injury as shown by statistical data on traffic stops.

The incidence of assault and death faced by officers in traffic stops is remarkably high. The latest figures available from the United States Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *Law Enforcement Officers Killed and Assaulted, 2005 and 2006*, are found at:
http://www/fbi.gov.ucr/killed/2006/table 67.html
http://www.fbi.gov/ucr/killed/2005/table 67.htm
The figures for 2007 are incomplete.

According to these statistics, officers were assaulted while making traffic stops 6,360 times during 2005 (Table 67) and 6,490 times during 2006 (*Ibid.*). In comparison, officers were assaulted while investigating suspicious persons or circumstances some 5,520 times during 2005 and 5,568 times during 2006. (*Id.*)

Encountering assaultive behavior while making traffic stops was more likely to occur than investigating suspicious persons or circumstances. Additionally, the number of officers involved in a traffic stop is not a guarantee of safety. In fact, most assaults occurred while an officer had a partner or a backup unit.

The situation in Arizona is not different from that in the rest of the country. In 2006, 283 officers were assaulted while making traffic stops, and in 2005, 292 officers were assaulted in the same circumstances. See *Crime in Arizona*, Arizona Dept. of Public Safety (2007) (Table, "Officer Assaults, Traffic Stops").

Amici also point out that this case is not just about the Fourth Amendment exclusionary rule. If officers are not permitted to frisk on reasonable suspicion suspected gang members in a car that is stopped for a traffic violation, whether in the context of an investigative detention or a consensual encounter, civil rights organizations will seek injunctive relief, sanctions against violations, and substantial attorneys' fees under 42 U.S.C. §§ 1983, 1988. See *Williams v. Alioto*, 549 F.2d 136 (9th Cir. 1977). We submit that officers should not be put to the choice of risking civil litigation or risking their lives.

Having stated the government's interest in maintaining the effectiveness and safety of law enforcement officers, the other side of the issue is the privacy interest of the individual. There is, of course, an expectation of privacy involved in every frisk and pat down for weapons. *Amici* submit, however, that this

Court has balanced these interests in *Terry v. Ohio* and its progeny, and that the fulcrum of this balance is reasonableness and officer safety.

Amici are involved in the training of police officers on legal issues in both recruit classes and advanced officer training programs. Most police recruits have not had prior significant exposure to constitutional issues. They are not lawyers and this Court has stated they are not expected to act as lawyers; that these concepts are practical, non-technical concepts that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949). Many courts seem to have forgotten this assessment. As a result, it becomes increasingly difficult to train and retrain officers on these concepts.

Amici submit that it is preferable, when possible, for police officers to have a standardized rule that guides them for the sake of their safety and effectiveness and for the sake of the civil rights of those with whom they come in contact. The vast majority of police officers do not want to violate citizens' civil rights, as they realize they enjoy the same rights. Law enforcement officers are taught to respect and protect the

civil rights of all persons. They look to the courts for direction on how best to provide that respect and protection. The adoption of reasonable suspicion for a person involved in a traffic stop—which this Court has said is in the nature of a seizure of both driver and passenger, see *Brendlin v. California*, 127 S.Ct. 2400 (2007)—as the basis for a frisk for officer safety is such a standardized rule.

CONCLUSION

Amici Curiae respectfully request the Court to reverse the Arizona Court of Appeals' decision and preserve an effective legal tool that allows law enforcement officers to properly protect themselves from harm while engaged in vehicle stops. We ask the Court to uphold the constitutionality of the law enforcement conduct involved in this case on the law and as a matter of sound judicial policy.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-1122

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

vs.

LEMON MONTREA JOHNSON,

Respondent.

On Writ of Certiorari to the Arizona Court of Appeals

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

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IN THE

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STATE OF ARIZONA,

Petitioner,

vs.

LEMON MONTREA JOHNSON,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In this case, the Arizona Court of Appeals held that a police officer violated the Fourth Amendment by conducting a protective frisk of a person who was probably a member of a violent gang and who presented a danger to the officer and her fellow officers in the course of their duties during a lawful traffic stop. In so holding, the court failed to strike the appropriate balance and reached a decision contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On April 19, 2002, Oro Valley Police Officer Maria Trevizo was patrolling a "gang related" neighborhood, known as Sugar Hill, near Tucson, Arizona, while on assignment for the state gang task force. *State* v. *Johnson*, 217 Ariz. 58, ¶2, 170 P. 3d 667 (App. 2007). Two other officers were on patrol with Officer Trevizo. *Ibid.* One of the officers " 'r[a]n the license plate of a vehicle' and found it had a 'mandatory insurance suspension.' " *Id.*, ¶3 (footnote omitted). The three officers stopped the vehicle.

Johnson was a passenger sitting in the rear of the vehicle. *Id.*, ¶4. At the time of the stop, Officer Trevizo had "no 'reason to believe that [Johnson] was engaged in criminal activity . . . .' " *Ibid.* However, Johnson's conduct in the car "was unusual," "and it made [Officer Trevizo] nervous." *Ibid.*

While another officer spoke to the driver and had the driver exit the vehicle to obtain information from the driver's license, registration, and insurance, Officer Trevizo spoke with Johnson in the back seat. *Id.*, ¶¶4, 7. During the stop, Officer Trevizo examined Johnson for one of seven criteria that indicate criminal street gang membership. See *id.*, ¶5, and n. 2. One indicator of gang membership is the color the individual is

wearing. At the time of the stop, Johnson was dressed "entirely in blue, and had a blue bandanna." *Id.*,¶5, and n. 2. Officer Trevizo had been trained to recognize bandannas as a sign of " 'allegiance or . . . affiliation with a certain gang.' " *Ibid.* She knew the color blue is associated with the Crips gang. *Id.*, ¶2.

Officer Trevizo also observed that Johnson had " 'a scanner in his jacket pocket.' " *Id.*, ¶6. This "concerned" Officer Trevizo because "people normally do not have [a scanner] 'unless they're going to be involved in some kind of criminal activity or going to try to evade police by listening to the scanner.' " *Ibid.*

During the stop, Officer Trevizo learned Johnson was from an area where the " 'predominant gang [is] called the Trekkle Park Crips,' " and that Johnson had been in prison for burglary but had been out for "about one year." *Id.*, ¶7. Suspecting Johnson to have knowledge about gang activity in the area, Officer Trevizo asked Johnson to step out of the vehicle. *Id.*, ¶8. "She sought to isolate [Johnson] from the other occupants of the vehicle in the hope that he would contribute more information." *Ibid.*

When Johnson exited, Officer "Trevizo 'asked [Johnson] to turn around' and 'patted him down for officer safety because [she] had a lot of information that . . . [led her] to believe [Johnson] might have a weapon on him.' " *Id.*, ¶9. At trial, Officer Trevizo testified "it was 'the totality of what happened that evening that led [her] to pat him down.' " *Ibid.* During the pat down, Officer Trevizo felt the butt of a gun near Johnson's waist. *Ibid.* When Johnson began to struggle, Officer Trevizo placed handcuffs on him. *Ibid.*

Johnson was charged and convicted by a jury of possession of a weapon by a prohibited possessor and possession of marijuana. *Id.*, ¶10. The trial court

denied Johnson's motion to suppress the evidence seized during the pat-down search conducted by Officer Trevizo for her safety. *Ibid.* On appeal, Johnson alleged the trial court had erroneously denied his motion to suppress. *Id.*, ¶11. Division Two of the Court of Appeals of Arizona agreed and held that an officer could not conduct a *Terry* frisk without establishing reasonable cause to believe " 'criminal activity may be afoot' " when an officer initiates an investigative encounter with a passenger that was "wholly unconnected to the original purposes of the routine traffic stop of the driver." *Id.*, ¶29, quoting *Terry* v. *Ohio*, 392 U. S. 1, 30 (1968). The Arizona Supreme Court denied discretionary review. Pet. for Cert. 1.

This Court granted certiorari on June 23, 2008.

SUMMARY OF ARGUMENT

The legality of a "frisk" does not necessarily depend on a preceding or continuing seizure. The general principle, as stated in Justice Harlan's concurrence in *Terry* v. *Ohio*, is "when an officer is lawfully confronting a possibly hostile person in the line of duty he has a right, springing only from the necessity of the situation and not from any broader right to disarm, to frisk for his own protection." In the typical *Terry*-stop situation, the lawful confrontation prong requires a valid detention of the person frisked, but there are other situations where this is not a requirement. When an officer serves a warrant or detains another person, performance of that duty may require confrontation of others who may be present. That unavoidable confrontation plus a reasonable basis to suspect the person may be armed and dangerous is sufficient to authorize a frisk. The Court of Appeals' discussion of when the seizure of Johnson ended is therefore irrelevant.

The Fourth Amendment is ultimately based on the reasonableness of the officer's action. A reasonably prudent officer's decision to frisk a person present while the officer performs his or her duty does not depend on whether that person is free to leave. If the person is present and possibly dangerous, a brief frisk for weapons is the prudent and reasonable action.

The Arizona Court of Appeals' decision in this case places an excessive limitation on the ability of officers to exercise command of a situation in which they have lawfully stopped a vehicle. In doing so, the court has aggravated the danger faced by officers in a dangerous situation that has resulted in the deaths of many peace officers. This decision fails to strike the appropriate balance between an important public safety interest and a relatively minor intrusion upon privacy.

ARGUMENT

I. The legality of a "frisk" does not necessarily depend on a preceding or continuing seizure.

The Court of Appeals in this case believed that under *Terry* v. *Ohio*, 392 U. S. 1 (1968), the legality of the frisk in this case depended on whether Johnson was legally seized at the time of the frisk. *State* v. *Johnson*, 217 Ariz. 58, ¶¶ 15-18, 170 P. 3d 667 (App. 2007). This assumption is fundamentally mistaken, and it produced an irrelevant discussion of whether Officer Trevizo's questioning of Johnson was consensual and at what point the seizure of Johnson ended. See *id.*, ¶¶ 16-27. None of this matters, because the officer's authority to frisk in this situation does not depend upon the passenger being seized.

The Court of Appeals relied on its precedent of *In re Ilono H.*, 210 Ariz. 473, ¶ 14, 113 P. 3d 696 (App. 2005),

which in turn relied on Justice Harlan's concurring opinion in *Terry*. See *Johnson*, 217 Ariz., ¶ 15. In this opinion, Justice Harlan stated the general principle as "when an officer is lawfully confronting a possibly hostile person in the line of duty he has a right, springing only from the necessity of the situation and not from any broader right to disarm, to frisk for his own protection." *Terry*, 392 U. S., at 32 (Harlan, J., concurring).

As applied to the particular situation before the Court in *Terry*, lawful confrontation in the line of duty meant "the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop." *Ibid.* (italics in original). That is, when the situation is simply an officer approaching a person he believes is suspicious, as in *Terry* and *Ilono*, a valid, forcible stop is one of the prerequisites to a lawful frisk. This is not, however, a universal principle for all frisk situations.

Professor LaFave states the general rule.

> "In determining whether a police officer had a basis for initiating a frisk, there are two matters to be considered: whether the officer had a sufficient degree of suspicion that the party frisked was armed and dangerous; and whether the officer was rightfully in the presence of the party frisked so as to be endangered if that person was armed." 4 W. LaFave, Search and Seizure § 9.6(a), p. 615 (4th ed. 2004).

After quoting the same portion of Justice Harlan's *Terry* opinion, LaFave continues,

> "Harlan's basic point is eminently sound. Although, as is noted below, there will sometimes be some *other proper reason* (e.g., to execute a search warrant, to arrest another person, or to conduct an

> investigatory stop of some other person) for being in the presence of the person who is believed to present the risk, the fact remains that a frisk for self-protection cannot be undertaken when the officer has unnecessarily put himself in a position of danger by not avoiding the individual in question." *Id.*, at 616 (emphasis added; footnotes omitted); see also *id.*, at 636 ("frisk-of-companion rule" is "[m]ost likely not" limited to a situation where the "companion himself could have been legitimately stopped for investigation").

The latter "just avoid him" rationale does not apply in the former "other proper reason" situations, where officers are placed in proximity to the possibly dangerous person in the performance of their duty.

In the search warrant situation, which LaFave says is "essentially the same analysis," LaFave § 9.6(a), at 638, *Ybarra* v. *Illinois*, 444 U. S. 85 (1979), illustrates the requirement for a frisk of a person whom a police officer lawfully confronts in the line of duty, when he has no basis for suspecting that person is presently engaged in any criminal activity. Ybarra happened to be in a bar where the police were serving a search warrant. The police patted down all of the customers present. See *id.*, at 88. "The initial frisk of Ybarra" was not valid because it "was simply not supported by a reasonable belief that he was armed and presently dangerous," *id.*, at 92-93, not because he had not been seized at that point. See *Los Angeles County* v. *Rettele*, 550 U. S. __, 127 S. Ct. 1989, 1992 (2007) ("officers may take reasonable action . . . to ensure their own safety"). The same principle applies to a person who is present at a traffic stop but who is not the target of the stop.

Where an officer simply walks up to a person on the street and asks questions, the officer could have avoided the confrontation, and *Terry* stop reasonable suspicion

is a prerequisite. Where a bystander or a passenger who is not seized chooses to remain at the scene of a stop even though free to leave, it is that person and not the officer who has chosen confrontation. In this situation, reason to suspect the person may be armed and dangerous should be the only requirement for a frisk.

The fact that Officer Trevizo asked Johnson questions he did not need to answer, for reasons unrelated to the traffic stop, is simply irrelevant to the Fourth Amendment question in this case. Asking questions is neither a search nor a seizure. See *Muehler* v. *Mena*, 544 U. S. 93, 100-101 (2005). When questioning neither causes nor prolongs a detention, it does not create a Fourth Amendment violation that would not otherwise exist. See *id.*, at 101-102.

The Fourth Amendment question is simply whether the frisk was reasonable under the circumstances. The relevant circumstances are that Officer Trevizo was assisting a lawful stop of a vehicle in which Johnson was a passenger. Johnson was on the scene, in the officers' presence. Perhaps he could have left at some point, but he did not. If he was armed, he presented a danger to the officers.

II. Fourth Amendment inquiry begins with a determination of what is reasonable.

Reasonableness is the touchstone of the Fourth Amendment. *Pennsylvania* v. *Mimms*, 434 U. S. 106, 108-109 (1977). "The essential purpose of the proscriptions of the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order ' "to safeguard the privacy and security of individuals against arbitrary invasions . . . ." ' " *Dela-*

ware v. *Prouse*, 440 U. S. 648, 653-654 (1979), quoting *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312 (1978) (footnote omitted).

It is through the prism of reasonableness that this Court must determine the practical standards that govern when an officer may frisk a passenger of a lawfully stopped vehicle. The same reasonableness that allows citizens to discern what constitutes fair or excessive government interference will simultaneously guide officers as they perform public safekeeping duties. This balance between reasonableness and public safekeeping is jeopardized when a court interprets the Fourth Amendment to limit the officer's authority to conduct a protective frisk because the court has determined that the encounter has crossed a nebulous line between a seizure and a nonseizure. See *State* v. *Johnson*, 217 Ariz. 58, ¶¶27-29, 170 P. 3d 667 (App. 2007) (finding search invalid because encounter had become consensual). The protective frisk is legitimate so long as the officer acted as a "reasonably prudent man" in deciding whether the brief intrusion was justified. *Terry* v. *Ohio*, 392 U. S. 1, 27 (1968).

Determining what action is prudent requires a realistic awareness of the risk. Individuals detained in routine traffic stops occasionally turn out to be armed criminals who present a grave danger to the officer. See U. S. Dept. of Justice, Federal Bureau of Investigation, Killed in the Line of Duty: A Study of Selected Felonious Killings of Law Enforcement Officers, p. 40 (Sept. 1992). In these situations, officers must be allowed a reasonable means of protection. Law enforcement officers need to be safe, and the government's interest in public safety justifies the brief intrusion of a protective frisk. See *Prouse*, 440 U. S., at 654 (reasoning "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's

Fourth Amendment interests against its promotion of legitimate governmental interests").

The Arizona Court of Appeals misapplied the principle of reasonableness when it adopted the rule that "when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purpose of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger . . . ." *Johnson*, 217 Ariz., ¶ 29. By making the legality of the risk depend on the irrelevant event of asking the passenger questions, the court detached the analysis from the reason that *Terry* found that frisks are reasonable in some situations. Instead, the lower court should have decided the issue it refused to reach, "whether officers, in the interests of their own safety, and based solely on the seizure resulting from the routine traffic stop, may routinely pat down passengers . . . whom they *reasonably* suspect might be dangerous." *Id.*, ¶ 28 (emphasis added).

III. The lower court's decision is an unreasonable and excessive limitation of the officer's "command" of a lawful detention.

If the lower court had addressed the correct issue, it would have had to acknowledge that the risk to officers during a lawful detention "is minimized if the officers routinely exercise unquestioned command of the situation." *Michigan* v. *Summers*, 452 U. S. 692, 702-703 (1981); see also *Los Angeles County* v. *Rettele*, 550 U. S. __, 127 S. Ct. 1989, 1993 (2007); *Muehler* v. *Mena*, 544 U. S. 93, 99 (2005); *Maryland* v. *Wilson*, 519 U. S. 408, 414 (1997). A protective frisk insures that an officer "lawfully confronting a possibly hostile person in the line of duty" can maintain control of the situation

and act for his own protection. *Terry* v. *Ohio*, 392 U. S. 1, 32 (1968) (Harlan, J., concurring).

Officers routinely place themselves in danger in the name of duty, and we must also allow reasonable procedures that enable officers to protect themselves. This Court has found it reasonable for an officer to order a passenger out of a car, as a precautionary measure, *Wilson*, 519 U. S., at 414-415, and has also found it reasonable for officers to detain the occupants of a home during the execution of a valid search warrant. *Rettele*, 127 S. Ct., at 1993-1994. Officer actions in each of these cases did not violate the Fourth Amendment, because the nature of these encounters placed the officers in potentially dangerous situations. Reasonable suspicion that the detainees had committed a criminal act was unnecessary, as the situation required the officers to lawfully confront potentially dangerous individuals, and the officers "act[ed] in a reasonable manner to protect themselves from harm." *Id.*, 127 S. Ct., at 1993-1994.

A *Terry* frisk for weapons is a minimal intrusion given that the passenger has already been detained, at least initially, and the risk to the officer is great. See *Brendlin* v. *California*, 551 U. S. __, 127 S. Ct. 2400, 2407 (2007). In fact, this Court has upheld more invasive procedures which protect officers executing valid search warrants. *Mena*, 544 U. S., at 99. In *Mena*, the plaintiff had been placed in handcuffs and detained in a converted garage, while officers searched her home for a gang member who was believed to be armed and dangerous. *Id.*, at 95-96. Mena claimed that she had been detained " 'for an unreasonable time and in an unreasonable manner' in violation of the Fourth Amendment." *Id.*, at 96. In finding no Fourth Amendment violation, this Court reasoned that "[t]he imposition of correctly applied handcuffs on Mena, who was

already being lawfully detained during a search of the house," was intrusive, but reasonable, because "[i]n such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants." *Id.*, at 99-100.

The use of a *Terry* frisk on a passenger in a lawfully stopped vehicle is decidedly less intrusive than the force utilized in *Mena*. The officer's decision to frisk should therefore be subject to less scrutiny, not more. If an officer has lawfully confronted a possibly hostile individual during the course of his duty, the officer's duty requires him to exercise command over that situation. When circumstances make it reasonable for the officer to perform a protective frisk, his conduct does not violate the Fourth Amendment.

By allowing for a "point" where an officer's command over a passenger ceases, so that the officer is no longer justified in conducting a protective frisk even though the passenger remains at the scene, the Arizona court has excessively limited an officer's ability to control a situation by disarming those who are potentially dangerous. *Johnson*, 217 Ariz., ¶ 18 (treating the termination of seizure as the termination of authority to frisk). The decision fails to consider that oftentimes a dangerous passenger will not walk away from the encounter and therefore will remain a danger. In these cases, it is reasonable for the officer to frisk the individual. It does not matter whether a frisk was the initial reason for the traffic stop, see *Illinois* v. *Caballes*, 543 U. S. 405, 408 (2005), nor should it matter that the officer did not immediately order the passenger out of the car. Cf. *Johnson*, 217 Ariz., ¶ 21. A Fourth Amendment standard that causes an officer to wonder whether he has reached the "point" where his ability to check a passenger for weapons has ceased is unreasonable and

will jeopardize the government's interests in public safety and effective law enforcement.

IV. Officers are required to seize potentially dangerous persons every day.

A. Seizure of Passengers.

A Fourth Amendment seizure occurs every time police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Michigan* v. *Chesternut*, 486 U. S. 567, 569 (1988). When vehicles are involved, investigatory seizures occur when the officer has reasonable suspicion to stop the car. See, *e.g.*, *Illinois* v. *Caballes*, 543 U. S. 405, 406 (2005); *Wyoming* v. *Houghton*, 526 U. S. 295, 297 (1999). While the driver may be the initial focus of the officer's inquiry, all of the occupants of the vehicle will be subject to "some scrutiny." *Brendlin* v. *California*, 551 U. S. __, 127 S. Ct. 2400, 2407 (2007). In *Brendlin*, this Court stated:

> "An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place." *Ibid.*

It is not unreasonable for scrutiny of the vehicle's occupants to result in a protective search. Of course, "[a] seizure that is justified solely by the interest [of a traffic stop] can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Caballes*, 543 U. S., at 407. But where the duration of the detention does not exceed its purpose, and any subsequent investigation does not by itself violate the Fourth Amendment, legitimate interests in privacy are not violated. See *id.*, at 408. An officer's decision to frisk does not "compromise" a legitimate privacy interest when his duty has placed him within striking distance of a potentially hostile person, so long as his search was reasonable.

LaFave has suggested that the degree of suspicion necessitating a constitutional frisk is lower than

> "the requisite degree of suspicion justifying [a] stop. Thus, assuming grounds for a stop, a certain suspicion that the person is armed might well warrant a search even though that suspicion, standing alone, would not justify a stopping to investigate the possibility that the individual is committing the offense of carrying a concealed weapon." 4 W. LaFave, Search and Seizure § 9.6(a), pp. 622-623, n. 33 (4th ed. 2004).

Furthermore, to protect his own safety, there are times when, either because of the driver's or a passenger's suspicious actions, an officer may feel the need to perform a pat down of all the passengers in a vehicle. See LaFave § 9.6(a), at 636 (stating the "frisk-of-companion rule" should not be viewed as only permitting a frisk when the companion himself could have been stopped because it "would not reach all cases in which the officers would be under reasonable apprehension"). If "the State's proffered justification—the safety of the officer—is both legitimate and weighty," *Mimms*,

434 U. S., at 110, the authority which permits the officer to detain should also permit a protective search based on reasonable suspicion that the passenger is armed and dangerous. "What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." *Mimms*, 434 U. S., at 111 (footnote omitted).

In *Mimms*, this Court "specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile." *Id.*, at 110. This Court acknowledged that, given the state's need to allow precautionary practices "to afford a degree of protection to the officer . . . ," *ibid.*, ordering the driver out of the car was a *de minimus* intrusion. *Id.*, at 111. *Maryland* v. *Wilson*, 519 U. S. 408, 410 (1997), extended the rule of *Mimms* to apply to passengers of a lawfully stopped vehicle. Again, this Court balanced society's interest in public safety against an interest in personal liberty. *Id.*, at 413. The principle of reasonableness required the Court, "as a practical matter," to acknowledge that because "the passengers are already stopped by virtue of the [lawful] stop of the vehicle," the additional intrusion of being required to exit the vehicle was minimal. *Id.*, at 413-414. The reasonableness of the officer's conduct did not depend on whether the passenger was suspected of criminal activity, but was based in a government interest for officer safety. It was because the presence of more than one occupant in the vehicle *increased the risk of harm to the officer*, and the passenger was already restricted by the legal stop, that the officer's action did not violate the Fourth Amendment. *Id.*, at 413-414.

It is not against common sense to extend the same interest in officer safety, which permits an officer to order a passenger out of a vehicle, to acknowledge the necessity of a pat down when a potentially armed

passenger steps out of the vehicle. An officer's common-sense experience compels him to pat down a possibly dangerous passenger who is present at the scene of a traffic stop. Even the dissenters of *Wilson* acknowledged that "if a police officer conducting a traffic stop has an articulable suspicion of possible danger, the officer may order passengers to exit the vehicle as a defensive tactic without running afoul of the Fourth Amendment." *Wilson*, 519 U. S., at 415 (Stevens, J., dissenting); cf. *id.*, at 416 (expressing concern only over stops where there is not a "scintilla of evidence of any potential risk to the police officer").

B. Hazards of Roadside Encounters.

The danger of traffic stops is shown in the statistics. From 1996 to 2005, 102 of 575 felonious law enforcement fatalities occurred during traffic stops. U. S. Dept. of Justice, Federal Bureau of Investigation, Law Enforcement Officers Killed and Assaulted, 2005 (Nov. 2006) (Table 26), online at http://www.fbi.gov/ucr/killed/2005/table26.htm. Homicides during traffic stops are a major cause of death, of the same magnitude as more obviously dangerous situations, such as arrests and ambushes. See *ibid.*

For example, in one case two Long Beach police officers were wounded during their initial approach of a stopped SUV. See Winton & Blankstein, Two Long Beach officers shot; The driver of an SUV who was pulled over for a traffic stop opens fire and flees, L. A. Times, Dec. 23, 2006, p. B1. "[T]he driver jumped out and fired at least a half a dozen shots." *Ibid.* One officer received "four shots to the neck." *Ibid.* His partner "was shot in the face." *Ibid.* Or consider the killing of Twinsburg, Ohio, Police Officer Joshua Miktarian. Miktarian was killed when he stopped a suspect for driving under the influence and playing loud

music. Kleinerman & Johnston, Twinsburg mourns officer killed in line of duty, The Plain Dealer, July 14, 2008, p. A1. "Two minutes into the traffic stop, Miktarian radioed for help, police said. Almost simultaneously, a 9-1-1 caller reported loud shouting and 'pop' sounds." *Ibid.*

Certainly, the high number of officers killed in traffic stops is due in large part to the fact that there are so many traffic stops. Even so, officers do die while conducting traffic stops, and they may be more at risk when there is another person in the car. In an FBI study of 51 officer homicides, "[e]leven of these killers were not the target of the officer's initial approach." U. S. Dept. of Justice, Federal Bureau of Investigation, Killed in the Line of Duty: A Study of Selected Felonious Killings of Law Enforcement Officers, p. 37 (Sept. 1992). In one case,

> "the victim officer executed a traffic stop in which there were three individuals in the vehicle. The victim wanted to cite the driver for a traffic violation, disregarding the two passengers. One of the passengers exited the vehicle, approached the patrol car in which the officer was seated, and shot and killed the officer." *Ibid.*

If this officer had exercised authority to pat down passengers of the vehicle that might be armed and dangerous, the passenger would not have had the opportunity to take his shot. The Fourth Amendment must not require officers to defer to the privacy interests of those they suspect are presently dangerous.

Justice Harlan's concurrence in *Terry*, properly understood, provides the key to the decision in the present case. In his concurrence, Justice Harlan states that when the question is "whether evidence produced by a frisk is admissible, the problem is to determine

what makes a frisk *reasonable*." *Terry* v. *Ohio*, 392 U. S. 1, 31 (1968) (Harlan, J., concurring) (emphasis added). The reasonableness of any frisk is justified when the officer "lawfully confronting a possibly hostile person in the line of duty" finds it necessary "to frisk for his own protection." *Id.*, at 32. A different standard would not only jeopardize officers as they conduct already dangerous jobs, but it would be contrary to the general principle of reasonableness, which has long guided Fourth Amendment inquiry. The decision in this case must support the right of an officer, "springing only from the necessity of the situation," *ibid.*, to frisk a passenger in a stopped vehicle whenever there is a reasonable basis to suspect he may be armed and dangerous.

In the present case, Johnson's gang clothing, possession of a scanner, and criminal history were more than sufficient to raise the requisite suspicion.

CONCLUSION

The decision of the Arizona Court of Appeals should be reversed.

September, 2008

Respectfully submitted,

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AMICUS CURIAE BRIEF

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(9)

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In the Supreme Court of the United States

STATE OF ARIZONA,

PETITIONER,

v.

LEMON MONTREA JOHNSON,

RESPONDENT.

On Writ of Certiorari to the
Arizona Court of Appeals

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

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INTEREST OF THE *AMICI CURIAE*

In its unanimous decision in *Knowles v. Iowa*, 525 U.S. 113 (1998), this Court indicated in dicta that after lawfully stopping a vehicle for a traffic offense, a police officer legitimately may frisk any of the car's occupants for weapons if the officer has an articulable basis to believe that the occupant might present a threat to the safety of the officer or others. See *id.* at 117-118. Unlike *Knowles*, this case squarely presents the issue, and petitioner asks the Court reaffirm its pronouncement that occupant frisks are lawful under these circumstances.

The *amici* States have a substantial interest in the resolution of this issue. Many state and lower federal courts have adopted this principle from *Knowles*, recognizing that vehicle stops present a particular danger to law enforcement, a tragic reality confirmed by the number of police officers who are assaulted and murdered each year during stops. The Court's rejection of petitioner's proposed rule would abrogate favorable law on which many States have come to rely and undermine States' ability to protect police officers and the public.

STATEMENT

1. Police Officer Maria Trevizo, accompanied by two partners, Officer Machado and Officer Gittings, lawfully stopped a vehicle in which respondent was a passenger. Pet. App. A2-A3. After the car pulled over, Officer Trevizo saw respondent, who was riding in the back seat, look back at the police, say something to the driver and front-seat passenger, and continue to watch the police. *Id.* at A3. Because people normally look

forward during a traffic stop, this conduct was unusual, and it made Officer Trevizo nervous. *Ibid.* Once the car stopped, Officer Machado asked the occupants to "put their hands where he [could] see them" and the driver to exit the car. *Ibid.* Officer Machado then questioned the driver, Officer Gittings questioned the front-seat passenger, and Officer Trevizo questioned respondent. *Id.* at A3-A5, A21.

A gang specialist, Officer Trevizo observed multiple indicia that respondent might be a gang member. *Id.* at A2-A3, A23-A24. She noted respondent's age; that he was dressed entirely in blue and wearing a blue bandana, attire favored by members of the "Crips" gang; and that the traffic stop occurred on the border of a known Crip neighborhood. *Id.* at A2-A4, A23. When asked for identification, respondent said that he did not have any but revealed that he was from Eloy, another Crip neighborhood, and that he was a convicted felon. *Id.* at A4, A23-A24. Officer Trevizo also noted that respondent was carrying a police scanner in his jacket pocket, indicating that he might be involved in criminal activity or seeking to evade the police. *Id.* at A4, A23.

Hoping to gather intelligence about respondent's gang, Officer Trevizo asked him to get out of the car for additional questioning. *Id.* at A4-A5. Respondent complied, and, after he exited the car, Officer Trevizo "patted him down for officer safety because [she] had a lot of information that would lead [her] to believe he might have a weapon on him." *Id.* at A5. Not only had respondent behaved unusually, but Officer Trevizo also knew from her police training that gang members often carry firearms. *Id.* at A2.

Officer Trevizo conducted a frisk of respondent's exterior clothing and felt the butt of a handgun at his waist. *Id.* at A5. A subsequent search of his person incident to arrest on a weapons charge revealed a small quantity of marijuana. Based on this evidence, respondent was charged with and convicted of possession of a weapon by a prohibited possessor and possession of marijuana. *Ibid.*

2. The Arizona Court of Appeals overturned respondent's conviction, holding that Officer Trevizo's pat-down violated the Fourth Amendment and suppressing the resulting evidence. *Id.* at A5-A17. According to the court, it was unnecessary to reach the question whether police "in the interests of their own safety, and based solely on the seizure resulting from the initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous," because Officer Trevizo did not "immediately" order respondent out of the vehicle to frisk him but instead conducted the pat-down after preliminarily questioning him and then requesting that he step out of the car for additional questions. *Id.* at A16. The court concluded that respondent's interaction with Officer Trevizo had "evolved into a separate, consensual encounter" by the time of the weapons frisk, and, accordingly, the pat-down could not be justified by officer safety concerns but instead required reasonable suspicion of criminal conduct independent of the traffic violation. *Id.* at A15-A17.

In dissent, Judge Espinosa stated that the majority had "essentially conclude[d] that an officer reasonably fearing for her safety during a lawful

roadside vehicle stop may not ensure her own safety and that of others by patting down a suspicious passenger for weapons." *Id.* at A18. This holding, he continued, "is not only contrary to settled law, but could have the unintended effect of unnecessarily increasing the already high level of risk faced by law enforcement officers during some vehicle stops." *Ibid.* Accordingly, Judge Espinosa would have held that the frisk was proper because it occurred within "a few short moments" of the traffic stop, *id.* at A20, the stop was ongoing and respondent could not reasonably have believed he was free to leave, and Officer Trevizo had reason to believe respondent might be armed and dangerous, *id.* at A20-A24.

3. The Arizona Supreme Court denied review, *id.* at B1-B2, and, on June 23, 2008, this Court granted Arizona's petition for certiorari to determine whether, "[i]n the context of a vehicular stop for a minor traffic infraction," an officer may "conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?"

SUMMARY OF ARGUMENT

In *Knowles*, this Court stated in dicta that, during a lawful traffic stop, the police "may order out of a vehicle both the driver, [*Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (*per curiam*)], and any passengers, [*Maryland v. Wilson*, 519 U.S. 408, 414 (1997)]," and "perform a 'patdown' of [the] driver and any passengers upon reasonable suspicion that they may be armed and dangerous, *Terry v. Ohio*, 392 U.S. 1 (1968)." *Knowles*, 525 U.S. at 117-118. Steadfast application of *Knowles* and the precedents cited therein requires confirmation of this principle to uphold the patdown in this case.

The rule urged by petitioner complies with the Court's well-settled mandate that a police search is reasonable and thus faithful to the Fourth Amendment if the public interest served by the search outweighs the individual's interest in avoiding the search. The always-weighty public interest in officer safety is heightened in the context of vehicle stops, which present a particular danger to law enforcement personnel. At the same time, the intrusion on the individual's interest is minimized, both because the applicable search is limited to a frisk of the outer clothing for weapons and because it is performed not as a matter of course but on individualized suspicion that the person being searched may be armed and dangerous.

Petitioner's proposed rule also comports with the holdings of myriad state and federal courts, which have consistently interpreted this Court's Fourth Amendment jurisprudence to allow the type of search performed here. These courts acknowledge the perilous nature of traffic stops and carefully hew to the

rule that a minimally intrusive frisk for weapons is permissible if the officer has a reasonable safety concern. Accordingly, a decision rejecting petitioner's proposed rule in this case would abrogate a host of decisions on which the States have come to rely to preserve the safety of law enforcement officers and the public.

Applied to this case, petitioner's rule requires reversal of the decision below. At the time respondent was frisked, the police had not yet concluded their investigation into the traffic offense, and no reasonable person in respondent's place would have felt free to terminate those proceedings. Under these circumstances, neither Officer Trevizo's subjective beliefs nor the nature of her questions could convert the ongoing traffic stop into a "consensual encounter." And because respondent's atypical behavior and likely gang affiliation gave Officer Trevizo firm grounds to suspect that he might be armed and dangerous, the Fourth Amendment did not prohibit her from searching him for weapons to protect her own safety and the safety of her fellow officers and the public.

ARGUMENT

The Arizona Court of Appeals diverged from numerous state and lower federal courts that have faithfully applied this Court's precedents to hold that, after lawfully stopping a car for a traffic infraction, the police may pat down the car's driver and any passengers on reasonable suspicion that they might be armed and dangerous. The Court should reverse the judgment below and thereby reaffirm the authority of law enforcement officers to protect themselves and the public from the dangers that are inherent in even routine traffic stops.

I. DURING A LAWFUL TRAFFIC STOP, POLICE MAY FRISK ANY OF THE CAR'S OCCUPANTS ON REASONABLE SUSPICION THAT THEY MIGHT BE ARMED AND DANGEROUS.

This Court's Fourth Amendment jurisprudence firmly supports the principle that, during a lawful traffic stop, a police officer may frisk one of the vehicle's occupants for weapons if the officer harbors reasonable concerns for his or her safety, without suspicion of criminal activity other than the traffic offence. *Terry* holds that police may detain a person whom they reasonably believe has committed or may commit a crime, and permits them to conduct a limited search for weapons based on a reasonable belief that the person might be armed and dangerous. See 392 U.S. at 22-27, 30-31. In *Mimms*, the Court extended the *Terry* rule to vehicle stops. See 434 U.S. at 109, 111-112 (approving police pat-down of driver pursuant to lawful vehicle stop on reasonable suspicion that he might be armed and dangerous). At the same time, the Court confirmed that the decision to stop an

automobile is reasonable so long as police have probable cause to believe a traffic offense has occurred. See *Mimms*, 434 U.S. at 109; see also *Whren v. United States*, 517 U.S. 806, 810-819 (1996) (rejecting argument that not every traffic offense provides justification for a police stop).

Also in *Mimms*, the Court held that the police may, as a matter of course, order the driver of a lawfully stopped car to exit his vehicle, see *Mimms*, 434 U.S. at 110-111, a principle that the Court subsequently extended to passengers, see *Wilson*, 519 U.S. at 410. Citing these precedents, the Court in *Knowles* stated that, "in the case of a routine traffic stop," the police may "order out of a vehicle both the driver * * * and any passengers" and "perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous." *Id.* at 117-118 (citations omitted). This statement was a correct application of the Court's prior decisions and should be confirmed here.

The Court has long recognized that "'[t]he touchstone of [its] analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Mimms*, 434 U.S. at 109 (quoting *Terry*, 392 U.S. at 19). Reasonableness in this context "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Mimms*, 434 U.S. at 109 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)); see also *Wilson*, 519 U.S. at 411. And in all events it is "'unreasonable to require that police officers take unnecessary risks in the performance of their duties.'"

Mimms, 434 U.S. at 110 (quoting *Terry*, 392 U.S. at 23).

Petitioner's rule follows inexorably from these established principles. First, it is "too plain for argument" that the public's interest in officer safety "is both legitimate and weighty." *Mimms*, 434 U.S. at 110; accord *Wilson*, 519 U.S. at 413 (noting the "weighty interest in officer safety"). This "important interest," *Mimms*, 434 U.S. at 111, is of special significance in cases like this one because "traffic stops may be dangerous encounters," *Wilson*, 519 U.S. at 413; accord *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) ("roadside encounters between police and suspects are especially hazardous"); *Foley v. Connelie*, 435 U.S. 291, 298 (1978) (noting "the number of police officers wounded or killed in the process of making inquiry in borderline, seemingly minor violation situations" involving traffic infractions); *Mimms*, 434 U.S. at 110 (acknowledging the "inordinate risk confronting an officer as he approaches a person seated in an automobile"). Additionally, the "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." *Wilson*, 519 U.S. at 414.

Recognizing the inherent danger traffic stops pose for police, the Court has approved a variety of searches undertaken during vehicle stops as necessary to protect officer safety. See, *e.g.*, *Long*, 463 U.S. at 1049 (police may search passenger compartment of stopped vehicle, on reasonable belief that suspect is dangerous and may gain immediate control of weapons); *Mimms*, 434 U.S. at 110-112 (police may order driver out of car during traffic stop and frisk for weapons on reasonable belief that driver is armed and dangerous); *United States v.*

Robinson, 414 U.S. 218, 234-235 & n.5 (1973) (after making arrest for traffic violation, police may perform full search of the person, even absent individualized suspicion that arrestee is armed and dangerous); see also *Adams v. Williams*, 407 U.S. 143, 147-148 & n.3 (1972) (while investigating suspect seated in car, police may undertake weapons frisk on reasonable suspicion that suspect is armed and dangerous).

The officer safety concerns underlying these decisions are equally compelling today. In *Long*, *Mimms*, and *Adams*, the Court relied on a 1963 study demonstrating that "approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile." *Long*, 463 U.S. at 1048 n.13; *Mimms*, 434 U.S. at 110; *Adams*, 407 U.S. at 148 n.3. And in *Robinson*, the Court cited 1973 data showing that a "significant percentage"—approximately one third—"of murders of police officers occur[red] when the officers were making traffic stops." 414 U.S. at 234 n.5. The Court also has relied on 1994 statistics demonstrating that in that year 5,762 officers were assaulted and 11 were killed during traffic pursuits and stops, see *Wilson*, 519 U.S. at 413, and has noted more generally that the "easy availability of firearms * * * is relevant to an assessment of the need for some form of self-protective search power," *Terry*, 392 U.S. at 24 n.21.

In the years since these cases were decided, the statistics on which the Court relied have remained remarkably consistent. The most recent data revealed that in 2006, 6,490 officers were assaulted and 8 were killed during traffic pursuits or stops. See Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted*, Tables 19

& 66 (2006) ("Uniform Crime Reports") (found at http://www.fbi.gov/ucr/killed/2006/table19.html & http://www.fbi.gov/ucr/killed/2006/table66.html).[1] More than 40% of those assaults involved a dangerous weapon such as a gun or a knife. See *Uniform Crime Reports*, Table 71 (found at http://www.fbi.gov/ucr/killed/2006/table71.html). Firearms were used to commit 78 of the 100 murders of law enforcement officers during traffic pursuits and stops—and 56 of the 64 murders during traffic offense stops—during the past ten years. See *Uniform Crime Reports*, Table 32 (found at http://www.fbi.gov/ucr/killed/2006/table32.html).

In sum, years of data establish the extreme danger that handguns and other easily concealed weapons pose to officers making traffic stops, and a rule permitting police to conduct brief, minimally intrusive searches for these weapons therefore furthers an obvious and monumental public purpose.

As for the personal liberty side of the ledger, the intrusion is not that occasioned by the initial stop or

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[1] All eight of the murdered officers were killed during traffic violation stops. See *Uniform Crime Reports*, Table 19 (found at http://www.fbi.gov/ucr/killed/2006/table19.html). Six of these murders—or 75%—involved a handgun. See *Uniform Crime Reports*, Table 31 (found at http://www.fbi.gov/ucr/killed/2006/table31.html). Although the FBI has yet to release final statistics for 2007, preliminary data show that 11 officers were killed during traffic pursuits and stops that year. See *Uniform Crime Reports*, May 12, 2008 Press Release (found at http://www.fbi.gov/pressrel/pressrel08/leoka051208htm).

the request to exit the vehicle—both of which are unquestionably lawful. See *supra* pp. 7-8. Rather, at issue is the additional invasion arising from the pat-down. To be sure, a protective search for weapons may inflict unpleasantness or discomfort. See *Terry*, 392 U.S. at 24-25. But such a search is less intrusive than long-permitted police measures. A weapons frisk is far less time-consuming and invasive than, for example, a full search of either the person or the car's passenger compartment—the former "must * * * be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments," *Terry*, 392 U.S. at 29, that is, it cannot exceed "a carefully limited search of the outer clothing * * * in an attempt to discover weapons," *id.* at 30; see also *Knowles*, 525 U.S. at 117 (noting "the considerably greater intrusion attending a full field-type search"). And unlike an order to exit the car after a traffic stop or a search of either the person or the passenger compartment incident to arrest, the pat-down is proper not as a matter of course, but only if the officer "has reason to believe that he is dealing with an armed and dangerous individual." *Terry*, 392 U.S. at 27.

In short, the public interest advanced by petitioner's rule grossly outweighs the relatively minor affront to personal liberty. The frisk for weapons is brief, far less invasive than a full search, and precipitated by individualized suspicion. Yet it serves a critical function in reducing the substantial threat to police and others that even the ~~most~~ routine traffic stops present.

II. State And Federal Courts Universally Endorse Petitioner's Rule.

Petitioner's proposed rule not only follows from this Court's Fourth Amendment decisions, but every state and lower federal court to reach the question—other than the court below—has adopted it. As dissenting Judge Espinosa recognized, the majority's conclusion below is quite simply "contrary to settled law." Pet. App. A18.

So long as there was a reasonable basis for the officer to suspect that the passenger might be armed and dangerous, federal courts of appeals have upheld pat-down searches accompanying vehicle stops. See, *e.g.*, *United States v. Soares*, 521 F.3d 117, 120-122 (1st Cir. 2008) (following stop for driving without headlights, pat-down of passenger was proper because officer observed passenger engage in suspicious movements); *United States v. Rice*, 483 F.3d 1079, 1084-1085 (10th Cir. 2007) (following stop for traffic infraction, pat-down of passenger was proper because police had information that passenger was armed and dangerous); *United States v. Hernandez-Rivas*, 348 F.3d 595, 599 (7th Cir. 2003) (following stop for speeding, pat-down of passenger was proper because police had information that passenger owned a firearm and might have been involved with drug crimes); *United States v. Raymond*, 152 F.3d 309, 312 (4th Cir. 1998) (following stop for speeding, pat-down of passenger was proper because officer observed passenger engage in suspicious movements); *United States v. Moorefield*, 111 F.3d 10, 13-14 (3d Cir. 1997) (same, regarding pat-down of passenger conducted following stop for traffic infractions); *United States v. Mitchell*, 951 F.2d 1291, 1295-1296 (D.C. Cir. 1991)

(same); *United States v. Woodall*, 938 F.2d 834, 837 (8th Cir. 1991) (following stop for traffic infractions, pat-down of passenger was proper because officer observed passenger engage in suspicious movements and had information that passenger might be involved in drug crimes); *United States v. Colin*, 928 F.2d 676, 678 (5th Cir. 1991) (following stop for traffic infractions, pat-down of passenger was proper because officer saw passenger engage in suspicious movements).

Indeed, those federal courts of appeals that have rejected such searches have done so only because the frisk was not justified by reasonable concerns for officer safety. See, *e.g.*, *Joshua v. DeWitt*, 341 F.3d 430, 443-444 (6th Cir. 2003) (had passenger and driver engaged in furtive gestures or other conduct giving rise to reasonable officer safety concerns, officer would have been justified in frisking them following traffic stop for speeding); *United States v. Wanless*, 882 F.2d 1459, 1465 n.10 (9th Cir. 1989) (absent any suggestion that passenger posed threat to police or that police believed their safety was in jeopardy, police pat-down of passenger following traffic stop for speeding was not justified). None of these decisions suggests that the search would have been unlawful had there been reasonable grounds to believe that the passenger might be armed and dangerous. On the contrary, they strongly imply precisely the opposite conclusion.

State supreme courts are also in accord. In *People v. Gonzalez*, 704 N.E.2d 375 (Ill. 1998), abrogated on other grounds by *People v. Sorenson*, 752 N.E. 2d 1078, 1083 (Ill. 2001), a police officer, after stopping a car in which the defendant was a passenger for speeding, observed the defendant "abruptly" get out and begin

walking away. See *Gonzalez*, 704 N.E.2d at 377. Although the officer had no reason to suspect that the defendant had committed or was committing a crime, Illinois' highest court held that the officer committed no Fourth Amendment violation when he ordered the defendant to return; asked him whether he was carrying any weapons; and, upon receiving an affirmative answer, subjected him to a pat-down that revealed a handgun. See *id.* at 380-385. As the court explained, the weapons search was justified because "the circumstances * * * were sufficient to create a reasonable suspicion that the defendant was armed and a threat to [the officer's] personal safety," thus satisfying the *Terry* standard. *Id.* at 385 (internal quotation marks omitted); see also *Sorenson*, 752 N.E.2d at 1084 ("following a lawful traffic stop," a police officer may subject "the driver and any passengers * * * to a limited search for weapons, commonly referred to as a 'frisk' * * * if the officer reasonably believes the person is armed and dangerous").

Likewise, other state supreme courts have approved a police officer's decision during a routine traffic stop to pat-down a passenger for weapons based on reasonable suspicion that the passenger might be armed and dangerous. See, *e.g.*, *State v. Banda*, 639 S.E.2d 36, 40-41 (S.C. 2006) (following stop for driving with stolen license plates, pat-down of passenger was proper because officer reasonably believed drugs were present in the vehicle, giving rise to reasonable presumption that weapons were present as well); *Fender v. State*, 74 P.3d 1220, 1225-1229 (Wyo. 2003) (following stop for speeding, pat-down of passenger was proper because circumstances, including bulge in

passenger's pocket, gave rise to reasonable officer safety concerns); *State v. Horrace*, 28 P.3d 753, 757-760 (Wash. 2001) (applying Washington law to hold that, following stop for speeding, pat-down of passenger was proper because officer observed driver engage in movements suggesting he had concealed a weapon in passenger's jacket); *Shaver v. State*, 963 S.W.2d 598, 599-600 (Ark. 1998) (following stop for speeding, pat-down of passenger was proper because officer had information that passenger had weapons in vehicle); *People v. Jackson*, 948 P.2d 506, 507-508 (Colo. 1997) (*en banc*) (following stop for traffic infractions, pat-down of passenger was proper because officer saw passenger making furtive gestures); *People v. Batista*, 672 N.E.2d 581, 583-584 (N.Y. 1996) (following stop for running red light, pat-down of passenger was proper because passenger engaged in unusual and evasive conduct); *State v. Smith*, 637 A.2d 158, 168-169 (N.J. 1994) (following stop for speeding, pat-down of passenger was proper because passenger engaged in unusual behavior and officer observed bulge beneath her blouse).

Numerous state appellate courts have reached the same conclusion. See, *e.g.*, *State v. Shearin*, 612 S.E.2d 371, 375-378 (N.C. Ct. App. 2005) (following stop for inoperable license plate light, pat-down of passenger was proper because passenger became agitated); *Dewberry v. State*, 905 So. 2d 963, 966-967 (Fla. Dist. Ct. App. 2005) (following stop for traffic infractions, pat-down of passenger was proper because officer saw passenger making furtive movements); *Matoumba v. State*, 873 A.2d 386, 389-392 (Md. Ct. Spec. App. 2005) (same, regarding pat-down following stop for speeding); *Ford v. State*, 26 S.W.3d 669, 673-674 (Tex. App. 2000)

(following stop for traffic offenses, pat-down of passenger was proper because officer observed passenger engage in furtive movements and knew he had scuffled with and fled from police in the past); *State v. Richards*, 713 So. 2d 514, 517 (La. Ct. App. 1998) (following stop for traffic infraction, pat-down of passenger was proper because passenger admitted to carrying a weapon); *Jackson v. State*, 669 N.E.2d 744, 748 (Ind. Ct. App. 1996) (following stop for traffic infraction, pat-down of passenger was proper because officer saw passenger making furtive movements); *Commonwealth v. Mesa*, 683 A.2d 643, 645-646 (Pa. Super. Ct. 1996) (same, regarding pat-down of passenger following stop for speeding); *People v. Massey*, 546 N.W.2d 711,712-713 (Mich. Ct. App. 1996) (following stop for speeding, pat-down of passenger was proper because officer observed bulge in passenger's jacket pocket at the waist); *State v. Randleman*, 671 N.E.2d 267, 269-270 (Ohio Ct. App. 1995) (following stop for routine traffic violation, pat-down of passenger was proper because officer observed passenger engage in suspicious movements and knew he had history of carrying guns); *State v. Phommachanh*, 662 A.2d 1343, 1344-1345 (Ct. App. Ct. 1995) (because police were justified in stopping car for traffic infraction, trial court erred in requiring suspicion of additional criminal conduct to justify pat-down of passenger; proper standard is whether police could reasonably believe passenger might be armed and dangerous); *Ammons v. State*, 322 S.E.2d 543, 544 (Ga. Ct. App. 1984) (following stop for drag racing, pat-down of passenger was proper because officer saw passenger making furtive movements); *State v. Jackson*, 557 P.2d 691,

692-694 (Or. Ct. App. 1976) (same, regarding pat-down of passenger following stop for expired license plates).

Still more state courts have indicated in dicta that they would reach similar holdings, were the question squarely presented. See, *e.g.*, *Mitchell v. State*, 745 N.E.2d 775, 780 (Ind. 2001) (during "routine traffic stop," "[a]n officer may perform a *Terry* 'pat-down' of a driver or any passenger if he has reasonable suspicion that they may be armed and dangerous"); *Camp v. State*, 983 So.2d 1141, 1144 (Ala. Crim. App. 2007) (stating that "officers conducting a traffic stop may take such steps as are reasonably necessary to protect their personal safety," including "a protective search of the driver, * * * the passengers, * * * and the vehicle") (internal quotation marks, brackets, and citations omitted).

And like their federal counterparts, the state courts that have rejected pat-downs have done so only where police officers lacked reasonable grounds to fear for their safety. See, *e.g.*, *McCain v. Commonwealth*, 659 S.E.2d 512, 516-518 (Va. 2008) (pat-down of passenger following traffic offense stop was improper because police lacked reasonable suspicion passenger might be armed and dangerous); *Commonwealth v. Washington*, 869 N.E.2d 605, 612 (Ma. 2007) (applying Massachusetts law to hold the same, regarding police exit order and pat-down of passenger following routine traffic stop); *State v. Kyles*, 675 N.W.2d 449, 453, 464 (Wis. 2004) (same, regarding pat-down of passenger following stop for operating without headlights after dark); *State v. Baker*, 182 P.3d 935, 939-941 (Utah Ct. App. 2008) (same, regarding pat-down of passenger following stop because license plate was not illuminated); *Erickson v. State*, 141 P.3d 356, 360-362

(Alaska App. 2006) (same, regarding pat-down of passenger following traffic offense stop); *State v. Eggersgluess*, 483 N.W.2d 94, 97 (Minn. Ct. App. 1992) (same).

In short, the state and federal courts to consider the question have universally held that police officers, acting on reasonable officer safety concerns, may frisk a stopped vehicle's occupants for weapons even absent cause to believe that the individual has committed or is committing a crime. This approach is well grounded in the uncontroverted rationale, see *supra* pp. 9-11, that traffic stops are inherently dangerous. Indeed, as then-Judge Roberts explained, "[a]pproaching a stopped car—particularly when there is reason to believe the driver or occupants may be armed—is one of the more perilous duties imposed on law enforcement officials." *United States v. Holmes*, 385 F.3d 786, 791 (D.C. Cir. 2004). This is because

> [e]very traffic stop * * * is a confrontation. The motorist must suspend his or her plans and anticipates receiving a fine or perhaps even a jail term. That expectation becomes even more real when the motorist or a passenger knows there are outstanding warrants or current criminal activities that may be discovered during the course of the stop. Resort to a loaded weapon is an increasingly plausible option for many motorists to escape those consequences, and the officer, when stopping a car on a routine traffic stop, never knows in advance which

> motorists have that option by virtue of possession of a loaded weapon in the car.

United States v. Holt, 264 F.3d 1215, 1223 (10th Cir. 2001) (*en banc*).

As a result, federal courts have recognized that "[t]he terrifying truth is that officers face a very real risk of being assaulted with a dangerous weapon each time they stop a vehicle." *Ibid.*; accord, *e.g.*, *United States v. Bullock*, 510 F.3d 342, 349 (D.C. Cir. 2007) ("Statistics show that traffic stops continue to be extraordinarily dangerous to the police officers who risk their lives to protect the public."); *Moorefield*, 111 F.3d at 13 ("traffic stops are dangerous encounters that result in assaults and murders of police officers"); *United States v. Stanfield*, 109 F.3d 976, 978 (4th Cir. 1997) ("Law enforcement officials literally risk their lives each time they approach occupied vehicles during the course of investigative stops."); *United States v. Menard*, 95 F.3d 9, 11 (8th Cir. 1996) (noting "the inherent danger traffic stops pose to police officers").

Myriad state court decisions echo this view. See, *e.g.*, *State v. Sloane*, 939 A.2d 796, 802 (N.J. 2008) (police officers "are at risk when they approach individuals during a traffic stop"); *Everitt v. General Electric Co.*, 932 A.2d 831, 844 (N.H. 2007) ("Even routine traffic stops can be unpredictable and can escalate into dangerous, and sometimes deadly, affairs."); *State v. Warren*, 78 P.3d 590, 596 (Utah 2003) (noting "inherent safety concerns in all traffic stops"); *State v. Vandenberg*, 81 P.3d 19, 28 (N.M. 2003) ("Relevant studies yield [the] disturbing results" that "[t]raffic stops can be very dangerous."); *Jackson*, 948 P.2d at 507 ("Roadside encounters between a police

officer and the occupants of an automobile present particular hazards that may give rise to the need to conduct a weapons search.") (internal quotation marks omitted); *State v. Irwin*, 137 P.3d 1024, 1028 (Idaho Ct. App. 2006) (noting "the general danger for police officers that requires wariness in any traffic stop"); *Shearin*, 612 S.E.2d at 378 ("the potential for danger to an officer during a traffic stop is high"); *Randleman*, 671 N.E.2d at 270 (noting that police officers are "vulnerable to danger" from both drivers and passengers during traffic stops).

That law enforcement officers face unique dangers when conducting even routine traffic stops is thus not subject to dispute. In light of these significant risks, state and lower federal courts have routinely approved police pat-downs of a vehicle's occupants on reasonable suspicion that they might be armed and dangerous, without requiring additional suspicion of criminal conduct other than the traffic offense. This Court should conclusively endorse this longstanding police practice, which accrues significant public safety benefits while imposing only minimal individual privacy costs.

III. Officer Trevizo's Pat-Down of Respondent Was Proper Because It Occurred During A Lawful Traffic Stop And On Reasonable Suspicion That He Might Be Armed And Dangerous.

Respondent does not dispute that the police had probable cause to stop the car in which he was riding for a violation of the traffic laws. This concession obviates any doubts about the propriety of the traffic stop, and, indeed, the Arizona Court of Appeals

expressed no such concerns. Instead, the majority was persuaded that, during the few moments before the pat-down, the stop came to an end and was replaced by a "consensual encounter" between respondent and Officer Trevizo. Pet. App. A15-A17. The majority was incorrect: Because no reasonable person in respondent's circumstances would have believed that the investigation into the traffic offense was complete and he was now free to leave, the traffic stop was ongoing, and Officer Trevizo therefore was entitled to undertake a limited search of respondent's person once the officer had reasonable grounds to fear for her safety.

Brendlin v. California, 127 S. Ct. 2400 (2007), establishes that respondent remained seized pursuant to the traffic stop at the time of the pat-down. There, the Court held that, during a traffic stop, a passenger is seized within the meaning of the Fourth Amendment so long as no "reasonable person in [his] position * * * would have believed himself free to terminate the encounter between the police and himself." *Id.* at 2406 (internal quotation marks and citation omitted). The Court emphasized that once a car has been pulled over a reasonable person would anticipate that any law enforcement officer "will not let people move around in ways that could jeopardize his safety." *Id.* at 2407.

By this standard (and as petitioner ably explains), a reasonable passenger in respondent's position would not have felt free to leave. Accordingly, respondent was seized pursuant to an ongoing traffic stop at the time of the frisk. To start, the police had not concluded their investigation into the traffic offense by returning to the car's driver his documentation or otherwise indicating that he was free to go. And while the driver

remained seized, so, too, was respondent, who was far from home,[2] without means of transportation, and without any indication from police that he was free to go. To the contrary, the officers' conduct communicated that respondent was required to stay. Officer Machado had ordered the car's occupants to put their hands where they could be seen, an officer questioned each occupant separately, and the driver and respondent were asked to exit the car for additional questioning. Pet. App. A3-A5, A21. As Judge Espinosa recognized, in light of these events, no reasonable person in respondent's situation could conclude that the stop was over insofar as he was concerned and he was free to leave. *Id.* at A20-A23.

Thus, the traffic stop was ongoing when Officer Trevizo frisked respondent. Under these circumstances, the police were entitled to perform a pat-down on reasonable suspicion that he might be armed and dangerous. Compare *Jackson*, 948 P.2d at 508 (police pat-down of passenger that occurred 10-15 minutes after traffic stop was proper given ongoing police investigation into traffic violation), with *State v. Henage*, 152 P.3d 16, 19-20 (Idaho 2007) (because police had concluded traffic stop by returning driver's documentation prior to pat-down of passenger, trial court did not clearly err in finding that stop had evolved into consensual encounter by time of pat-down). That the pat-down did not occur immediately after the car was pulled over does not counsel otherwise, for there is no reason to believe that "an

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[2] Eloy, Arizona, which respondent identified as his home, is approximately fifty miles from Tucson, Arizona, where the traffic stop occurred.

investigating officer cannot be in as much danger at the end of a traffic stop as at the beginning, or at least reasonably believe that to be so." *Vandenberg*, 81 P.3d at 28. As a result, Officer Trevizo did not need to address her concerns about respondent's dangerousness simply by "avoid[ing]" him, as the Arizona Court of Appeals suggested. Pet. App. A8 (internal quotation marks and citation omitted). To the contrary, because respondent was detained pursuant to an ongoing traffic stop, Officer Trevizo was entitled to undertake a pat-down to alleviate reasonable officer safety concerns.

The court below concluded otherwise, citing Officer Trevizo's testimony that she believed respondent was free to decline to exit the car for additional questioning and the fact that her intended line of questions was unrelated to the purpose of the traffic stop. This was error for two reasons.

First, "[s]ubjective intentions play no role" in the Fourth Amendment analysis. *Whren*, 517 U.S. at 813; see also *Brendlin*, 127 S. Ct. at 2408-2409. Accordingly, that Officer Trevizo had decided in her own mind that respondent was free to refuse to participate is immaterial. This Court has repeatedly "noted [its] 'unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers.'" *Arkansas v. Sullivan*, 532 U.S. 769, 771-772 (2001) (quoting *Whren*, 517 U.S. at 813). Thus, "'the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action as long as the circumstances, viewed objectively, justify the action.'" *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)

(quoting *Whren*, 517 U.S. at 813). The state court should not have considered Officer Trevizo's subjective intentions.

Rather, the appropriate inquiry, as we have explained, is what a reasonable person in respondent's situation would have understood. Officer Trevizo never told respondent that he was free to refuse to answer her questions or get out of the car, and no reasonable person in his circumstances would have understood that he was free to do so. On this point, as Judge Espinosa noted, Pet. App. A20-A21, the court confused Officer Trevizo's courtesy and respondent's cooperation with a termination of the seizure. That Officer Trevizo asked rather than ordered respondent to exit the car would not have conveyed to a reasonable person that he was free to decline. Where police have detained a vehicle, common sense suggests that a reasonable passenger would understand an officer's request to exit the car as an offer not to be refused. Indeed, a holding otherwise would discourage police officers from treating detainees with courtesy, something the "reasonableness" inquiry underlying this Court's Fourth Amendment jurisprudence cannot tolerate. Equally, that respondent cooperated does not, in and of itself, suggest that the seizure was over. It indicates merely that respondent made the understandable decision to acquiesce rather than escalate the situation.

Second, that Officer Trevizo questioned respondent about matters unrelated to the traffic stop is also immaterial. Although a stop "that is lawful at its inception" may violate the Fourth Amendment "if it is prolonged beyond the time reasonably required to complete" the stop's mission, there is no violation so

long as the stop was "executed in a reasonable manner" and its duration "justified by the traffic offense and the ordinary inquiries incident to such a stop." *Illinois v. Caballes*, 543 U.S. 405, 407-408 (2005). This is true even if a police officer's conduct precipitates a "shift in purpose" during the investigation, so long as that conduct does not in and of itself implicate the Fourth Amendment. *Id.* at 408-409. Thus, in *Caballes*, the Court held that the use of a narcotics-detection dog during a lawful traffic stop does not run afoul of the Fourth Amendment. See *id.* at 408-410. And in *Muehler v. Mena*, 544 U.S. 93 (2005), the Court followed *Caballes* to hold that police properly may ask questions unrelated to the purpose of a seizure without running afoul of the Fourth Amendment, so long as the off-topic questioning does not prolong the detention. See *id.* at 101.[3] As the Court explained, "'mere police questioning does not constitute a seizure,'" and, accordingly, off-topic questioning without more cannot violate the Fourth Amendment. *Ibid.* (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

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[3] Although *Muehler* concerned the detention of a home's occupants while the premises were searched pursuant to a warrant, courts have universally recognized that *Muehler* is equally applicable to traffic stops. See, *e.g.*, *United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007); *United States v. Olivera-Mendez*, 484 F.3d 505, 510 (8th Cir. 2007); *United States v. Mendez*, 476 F.3d 1077, 1080 (9th Cir. 2007); *United States v. Stewart*, 473 F.3d 1265, 1269 (10th Cir. 2007); *United States v. Hernandez*, 418 F.3d 1206, 1209 n.3 (11th Cir. 2005); *United States v. Singh*, 415 F.3d 288, 294 (2d Cir. 2005); see also *People v. Harris*, 886 N.E.2d 947, 960-961 (Ill. 2008) (collecting cases).

Because respondent remained seized pursuant to a lawful traffic stop, Officer Trevizo was entitled to frisk him if there were reasonable grounds to suspect that he might be armed and dangerous. And although the Arizona Court of Appeals declined to resolve the issue, Pet. App. A14, there can be no question that reasonable suspicion supported the pat-down here. A weapons frisk "is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Long*, 463 U.S. at 1049 (quoting *Terry*, 392 U.S. at 21). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. Moreover, "[t]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

As Judge Espinosa recognized, Pet. App. A23-A24, this standard was clearly satisfied. Multiple factors would have led a reasonable officer to believe that respondent might be armed and dangerous. Officer Trevizo observed a scanner in respondent's jacket pocket, suggesting that he may be involved in criminal activity and, thus, carrying a firearm. Cf. *Batista*, 672 N.E.2d at 583 (noting that while wearing a bulletproof vest is not, itself, illegal, it reasonably suggests possession of a firearm). She also noted the many signs that respondent was associated with a gang—his

age, the blue clothing and bandana, his felon status, his being from a known Crip neighborhood, and the location of the stop on the border of another Crip area. The "characteristics of a location" are "among the relevant contextual considerations in a *Terry* analysis." *Wardlow*, 528 U.S. at 124. And Officer Trevizo also knew from her police training that gang members often carry firearms. Under these circumstances, she was prudent to conclude that respondent might present a danger to her safety, as well as the safety of her fellow officers and the public. Indeed, it would have been imprudent for her to conclude otherwise, and, accordingly, her pat-down of respondent was properly justified by reasonable safety concerns and was therefore lawful.

CONCLUSION

The decision of the Arizona Court of Appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 07-1122

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

LEMON MONTREA JOHNSON,

Respondent.

On Writ Of Certiorari to the Court Of Appeals of Arizona

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STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; to promote the proper and fair administration of criminal justice; and to emphasize the continued recognition and adherence to the Bill of Rights that is necessary to sustain the quality of the American system of justice. As such, the NACDL has a strong interest in the preservation of the Fourth Amendment rights that are at issue in this case.

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus or its counsel made a monetary contribution to its preparation or submission. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

ARGUMENT

Both petitioner and *amicus* United States, going beyond the narrow facts of this case, articulate an unprecedented, and dangerously open-ended, view of law enforcement officers' authority to perform so-called *Terry* searches. In particular, they contend that officers may lawfully "frisk" a person they reasonably believe to be armed and dangerous, even when there is no suspicion of wrongdoing and no need for the officer to interact with the person at all — *i.e.*, "whenever the officer encounters that person in a place where the officer has a lawful right to be." Br. of United States at 9; *see also* Pet. Br. at 23.

This sweeping rule goes far beyond the narrow Fourth Amendment exception created by *Terry v. Ohio* and its progeny, which have required specific reason for an officer to interact with a citizen before a subsequent search for officer safety purposes may be constitutional. *E.g., Adams v. Williams*, 407 U.S. 147 (1972) (citing and applying *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). And it threatens to create precisely the sort of unbounded officer discretion that the Framers of the Fourth Amendment were most concerned with eliminating.

POINT I

TERRY REQUIRES OFFICERS TO HAVE A NEED TO CONFRONT A PARTICULAR CITIZEN BEFORE A FRISK CAN BE JUSTIFIED

Terry v. Ohio addressed "the quite narrow question" of "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest." 392 U.S. 1, 17 (1968). *Terry*'s

holding, like its framing of the question, was narrow: that a frisk is justified when officers can reasonably conclude both that "criminal activity may be afoot *and* that the persons . . . may be armed and presently dangerous." *Id.* at 30 (emphasis added). *See also Adams*, 407 U.S. at 146 (limited search for weapons may be conducted *"[s]o long as the officer is entitled to make a forcible stop, and* has reason to believe that the suspect is armed and dangerous") (emphasis added).

Petitioner and the United States now seek to omit the first requirement for a *Terry* search, and to replace it with the essentially meaningless limitation that the officer have a "lawful right" to be present. Br. for U.S. at 9. This rule simply cannot be squared with *Terry*. As Justice Harlan observed in his *Terry* concurrence, it is implicit in the Court's holding that the mere permissibility of the officer's presence is not enough: the frisk in *Terry* was permissible "only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime." 392 U.S. at 34 (Harlan, J., concurring). Absent the justification created by the need to investigate reasonably suspected criminal activity, the officer is "at liberty to avoid a person he considers dangerous," and accordingly officer safety cannot justify an invasion of the person's privacy. *Id.* at 32.

Justice Harlan's interpretation of the majority opinion is clearly correct. The holding in *Terry* is expressly premised on a balancing of the substantial individual interest in avoiding "a severe, though brief, intrusion upon cherished personal security," 392 U.S. at 24-25, against "the governmental

interest which allegedly justifies [the] official intrusion." *Id.* at 21 (internal quotation marks omitted). Under the circumstances of *Terry*, the governmental interest in the officer engaging in an encounter with the defendant was substantial — the officer had a need to investigate suspicious activity, in a situation in which simply avoiding the defendant was not an appropriate option: given that a crime appeared to be afoot, "it would have been poor police work indeed" to fail to actively investigate further. *Id.* at 22-23. In weighing these interests, this Court held that legal authority should be "narrowly drawn" to allow a limited search to serve the governmental interests of both criminal investigation and officer safety "in the investigative circumstance." *Id.* at 26, 27.

This reasoning cannot support the "lawfully present" rule proposed in support of petitioner here. In consensual police encounters, involving no reasonable suspicion of criminal activity, there is no pressing governmental need for an officer to confront an individual who he suspects may be dangerous, and, therefore, no basis for invading Fourth Amendment rights. Accordingly, as Justice Harlan recognized, under *Terry*, "the right to frisk . . . depends upon the reasonableness of a forcible stop to investigate a suspected crime." *Id.* at 33 (Harlan, J., concurring). Although this Court has extended this reasoning to other circumstances in which an officer has a need to interact with an individual he believes to be dangerous, *see, e.g., Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977), it has never applied it to circumstances in which the officer has no such need — *i.e.*, where the officer is merely lawfully present.

As a practical matter, moreover, the additional searches that would be justified by the proposed blanket rule are exclusively those where the officer does *not* have a legal basis to detain the suspect and where being armed would *not* by itself constitute criminal conduct.[2] Such a rule would therefore apply principally where the person searched is acting in a lawful manner and the officer is acting on a "hunch" or some other grounds that is inadequate to justify a privacy intrusion in the first instance.

Indeed, under the proposed rule — with the limitation of reasonable suspicion of criminal activity eliminated — the "serious intrusion" and "great indignity" of a police pat-down, *Terry*, 392 U.S. at 17, 29, will be available at the essentially untrammeled discretion of law enforcement officers. This conflicts with one of the central purposes of Fourth Amendment requirements, which is the restriction of such discretion. "[S]tandardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (holding that a vehicle stop for the purpose of

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[2] It is worth noting that the factual basis for suspecting that an individual is "armed and dangerous" will frequently also provide a reasonable suspicion of a criminal violation. Carrying a concealed weapon is itself a crime in many jurisdictions. Petitioner and the United States, however, seek authorization for officers to search even when, as here, there is no crime suspected.

checking the driver's license and registration where no individualized suspicion exists violates the 4th amendment); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, dissenting) ("[U]nbounded discretion carries with it grave potential for abuse.").

Finally, it is worth noting that, as the *Terry* Court observed, countenancing aggressive and discretionary police use of pat-down searches "cannot help but be a severely exacerbating factor in police-community tensions." 392 U.S. at 14 n.11. The proposed rule would also create a disincentive for voluntary cooperation with police, where such consensual contact will justify an invasive personal search upon any suspicion that an individual is armed.

POINT II

CONCERN ABOUT EXCESSIVE DISCRETION TO SEARCH WAS AT THE CORE OF THE FRAMING OF THE FOURTH AMENDMENT

At the core of the Fourth Amendment's history is a strong concern about officers having excessively broad discretion to intrude upon citizens' privacy. The broad officer discretion that petitioners and the United States seek to enable is directly contrary to these fundamental concerns of the Framers.

One of the core concerns of the Framers was to prohibit searches conducted in the absence of reasonable suspicion of illegal activity. Before 1760, the New England and mid-Atlantic colonies permitted general and warrantless searches as a "standard method of law enforcement." Tracey Maclin, *The Complexity of the Fourth Amendment:*

A Historical Review, 77 B. U. L. REV. 925, 939 (1997). Colonial attitudes toward these sweeping intrusions into citizens' privacy grew increasingly hostile in the mid-1700s, and public opposition towards customs officers' arbitrary searches was particularly sharp. *See* Maclin at 945 (quoting M. H. Smith, *The Writs of Assistance Case* 114-15 (1978)) (describing how "more impressive authority than mere customs officer's commission" was needed to enforce searches).

In addition, general warrants, also known as "writs of assistance," were "an anathema in the colonies," and are considered to be a major cause of the Revolution. *See generally* O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in THE ERA OF THE AMERICAN REVOLUTION 54 (1937). They permitted officers to search, with broad discretion, "wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their eye." Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 54 (1937). Customs officers could obtain writs of assistance "without alleging illegal activity as a precondition for them, without judicial superintendence, and without the possibility of refusal." Maclin, 77 B.U. L. Rev. at 946. After the Revolution, states widely eliminated the offensive general warrant, and replaced it with specific warrants, thereby sharply curbing an officer's discretion in conducting searches. *Id.* at 949.

Notably, distrust of common officers and opposition to delegating authority to them were consistent themes in complaints against the writs of assistance. During the 1761 *Writs of Assistance*

Case, James Otis decried the delegation of authority to "petty" officers. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 548, 578 (1999-2000). In the seventeenth century, Sir Matthew Hale criticized general warrants in his criminal law treatise because they allowed officers to act as their "own judge," a principle Sir Edward Coke had also invoked in *Dr. Bonham's Case*. *See* 2 Sir Matthew Hale, *History of the Pleas of the Crown* 150 (Solemn Emlyn ed., 1736); Davies at 692. Furthermore, a leading eighteenth-century authority on criminal procedure, Serjeant William Hawkins, opposed general warrants because they inappropriately gave discretion to common officers to decide who to arrest and where to search. *Id.* at 579. In the 1765 proceedings in *Leach v. Money*, Lord Mansfield stated that general warrants were illegal under common law because an officer should not have the discretion to make arrest and search judgments. *Leach v. Money*, 3 Burr. 1742, 1766, 19 Howell St. Tr. 1001, 1027, 97 Eng. Rep. 1075, 1088 (K.B. 1765). Blackstone later wrote that "it is the duty of the magistrate, and ought not be left to the officer, to judge of the grounds of suspicion." 4 William Blackstone, *Commentaries on the Laws of England* 288 (1769, reprinted facsimile The University of Chicago Press, 1979). In yet another case, *Wilkes v. Wood*, Judge Pratt also decried the discretionary nature of the general warrants, noting that "a discretionary power given to [officers] to search wherever their suspicions may change to fall. . . is totally subversive to the liberty of the subject." *Wilkes v. Wood*, Lofft 18, 18, 19 Howell St. Tr. 1153, 1167, 98 Eng. Rep. 489, 498 (C.P. 1763). These accounts clearly demonstrate that framing-era

authorities opposed placing broad discretion in the hands of common officers.

Moreover, Pennsylvania, Virginia, and Florida judges used similar reasoning against the writs authorized by the Townshend Act of 1767, arguing that officers should not be given such extensive power to exercise at their own discretion. Dickerson, *Writs of Assistance*, at 60-61, 64, 69. For example, William Henry Drayton, a Charleston judge, and Patrick Henry both repeatedly opposed allowing officers to exercise discretion in search and arrest decisions. William Henry Drayton, *A Letter from Freeman*, Aug. 10, 1774, *reprinted in* I DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION 11, 15 (R.W. Gibbes ed., 1855, reprinted 1972); 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 587-88 (Jonathan Elliot ed., 2d ed. 1838, reprinted in facsimile 1937); *see* Davies, *Recovering the Original Fourth Amendment*, at 581-82. Patrick Henry likewise objected to searches lacking an initial basis, stating:

> [G]eneral warrants, by which an officer may search suspected places, *without evidence of the commission of fact*, or seize any person, *without evidence of his crime*, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power.

3 DEBATES at 588 (emphasis added).

Thus, allowing any lawfully present officer to search any person based solely on a belief he or she is armed and dangerous stands in direct opposition to framing-era principles. To be sure, exigent circumstances may require departure from bright-line Fourth Amendment requirements and acceptance of searches that are necessitated by the exigency. But that is no justification for the rule proposed here, under which serious invasions of personal privacy would be permitted in the absence of any need to depart from Fourth Amendment protections.

In short, given the historical distrust of common officer discretion, the Framers would not have sanctioned the broad use of warrantless frisks without a demonstrable need for an encounter. *See* Davies, 98 MICH. L. REV. at 582. The sweeping rule proposed by petitioner and the United States cannot be squared with the core concerns embodied in the Fourth Amendment.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

STATE OF ARIZONA,
Petitioner,

v.

LEMON MONTREA JOHNSON,
Respondent.

On Writ of Certiorari to the Arizona Court of Appeals

BRIEF OF THE NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a police officer may conduct a pat-down search of a passenger in a lawfully-stopped vehicle when there is a reasonable basis to think the passenger is armed and dangerous.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] Law enforcement and public safety are among their most important responsibilities to their citizens. *Amici* also have a compelling interest in maximizing police officer safety in potentially dangerous situations. They accordingly submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

A. The sole purpose of a pat-down is "the protection of the police officer and others nearby" when an officer reasonably believes that an individual she is "investigating at close range is armed and dangerous" to herself or others. *Terry v. Ohio*, 392 U.S. 1, 24, 29 (1968). This common-sense principle, which is not dependent upon reasonable suspicion of criminal activity, should control this case.

Like the on-the-street encounter in *Terry*, a traffic stop is a nonconsensual seizure that requires officers to approach potentially dangerous persons. When an officer investigates a traffic violation, she must initiate contact with the car's occupants and obtain documentary information. This Court has "specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile," *Pennsylvania v. Mimms*, 434 U.S. 106,

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

110 (1977), and noted that the motivation of passengers to employ violence to prevent apprehension at least equals that of the driver.

For their own protection, officers are thus authorized to instruct all occupants in a stopped car to exit the vehicle "pending completion of the stop." *Maryland v. Wilson*, 519 U.S. 408, 415 (1997). Upon reasonable suspicion that any person—driver or passenger—is armed and dangerous, officers are further authorized to conduct a pat-down for weapons. Because Officer Trevizo reasonably suspected that respondent was an armed and dangerous gang member, requesting that he exit the car and patting him down for weapons was reasonable and thus valid under the Fourth Amendment.

B. Because of the risks inherent in traffic stops, police officers must have discretion as to when and how to exercise their authority during the stop. Sometimes they may order all occupants out of the car, sometimes none, and sometimes they may single out a passenger to exit once reasonable suspicion that he is a threat crystallizes. In any event, an officer does not forfeit the authority to order a passenger out of a car merely by not doing so at the beginning of the stop.

Allowing officers discretion to decide when and how to direct occupants to exit the car is vital because traffic stops require quick decision-making under a variety of circumstances. As this Court has long recognized, discretionary judgments in the field are often difficult to second-guess, and officers require clear and simple rules to follow.

This is particularly true when officers must confront not only the threat of violence but an array of

conditions that require specialized training to make tactical choices. *See* New York City Police Dept. Police Acad., *Recruit Training Section, Car Stop Lesson Plan* 3-5 (2006); District of Columbia Metro. Police Dept., *Unknown/High Risk Traffic Stops Lesson Plan* 4-6 (2007). Thus, during a traffic stop, officers must be able to respond to perceived threats from the driver or passengers at any time from the commencement of the stop to its conclusion.

Conversely, officers in the field should not be hamstrung by unrealistic and technical jurisprudential distinctions that prevent them from protecting themselves. Yet the court below made such a distinction in reasoning that because Officer Trevizo did not immediately order respondent to exit the car, and because she engaged in a cooperative conversation with him, his seizure was transformed into a consensual encounter. This decision subverts the premise of this Court's cases which hold that an officer must be able to control a traffic stop because of the risk it presents to her safety.

This *sine qua non* of effective law enforcement is not lost merely because an officer engages in a brief and cooperative conversation with a passenger. It is within the discretion of an officer to make basic inquiries of a seized person in order to confirm or dispel her suspicions. Indeed, it is within her discretion to make inquiries outside of the scope of the purpose of the stop, as long as the questioning does not prolong it. And given such scrutiny, no reasonable passenger would feel free to leave the scene. Thus, respondent remained seized throughout the duration of the stop and Officer Trevizo retained the authority to pat him down.

ARGUMENT

A POLICE OFFICER MAY CONDUCT A PAT-DOWN SEARCH OF A PASSENGER IN A LAWFULLY-STOPPED VEHICLE WHEN THERE IS A REASONABLE BASIS TO THINK THE PASSENGER IS ARMED AND DANGEROUS

A. Every Traffic Stop Is a Nonconsensual Seizure Requiring Police to Be in Close Proximity to the Car's Potentially Dangerous Occupants.

In situations requiring a police officer to be in close contact with a person that she believes is armed and dangerous, the sole purpose of a pat-down is "the protection of the police officer and others nearby." *Terry v. Ohio*, 392 U.S. 1, 29 (1968). As the Court explained in *Terry*:

> When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 24. This principle was illustrated in *Terry* by an on-the-street seizure of three men that was justified by an officer's reasonable suspicion that they were about to rob a store. Once the officer had reason to be within close range—and with reason to fear for his safety—he had the authority to pat them down for weapons.

The same principle applies to traffic stops, which require police officers to be in close proximity to persons who may be armed and dangerous.[2] A traffic stop is a nonconsensual seizure, *see Brendlin v. California*, 127 S. Ct. 2400 (2007), and conducting an investigative inquiry invariably requires the officer to approach the car, initiate contact with its occupants, and obtain license, registration, and insurance information. *See Berkemer v. McCarty*, 468 U.S. 420, 437-39 (1984) (in this respect, "the usual traffic stop is . . . analogous to a so-called '*Terry* stop' . . . .").

This Court has "specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile."[3] *Pennsylvania v.*

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[2] This Court has long recognized that the principles of *Terry* are not restricted to its facts as an on-the-street "stop and frisk" which was based on suspicion of criminal activity. *See Maryland v. Buie*, 494 U.S. 325 (1990) (protective sweep in a home of areas where armed persons could be hiding justified by *Terry* principles); *Michigan v. Long*, 463 U.S. 1032 (1983) (protective search of a car's passenger compartment justified by *Terry* principles); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam) (order to exit the car and subsequent pat-down justified by *Terry* principles).

[3] As the New York City Police Department teaches trainees,

> One of the most dangerous tasks that a law enforcement officer must do is stopping a motor vehicle. We classify vehicle stops into categories of 'unknown risk' and 'high risk' stops. There is no such thing as a 'routine' vehicle stop. An officer can never know what he or she might encounter during any vehicle stop. Officers must remain on guard at all times. It is important to remain alert and remain professional in your interaction with the occupants of any stopped vehicle.

New York City Police Dept. Police Acad., *Recruit Training Section: Curriculum Pertaining to the Dangers of Car Stops* 2 (2008).

Mimms, 434 U.S. 106, 110 (1977) (per curiam); *Michigan v. Long*, 463 U.S. 1032, 1047 (1983) (traffic stops are "especially fraught with danger to police officers"). And as this Court has recognized, "[i]t would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop." *Maryland v. Wilson*, 519 U.S. 408, 414 (1997). In such a situation, "the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver." *Id.*

Indeed, traffic stops present unique risks that have led the Court to authorize *per se* measures to ensure police safety, even in the absence of reasonable suspicion. In *Mimms*, for example, the Court held that it was reasonable for police to order a driver to exit a stopped car. 434 U.S. at 106. Noting the "significant percentage of murders of police officers [that] occurs when the officers are making traffic stops," *id.* at 110 (citation omitted), as well as the hazard from passing traffic, *id.* at 111, the Court determined that the weighty interest in officer safety always outweighs the *de minimis* intrusion of exiting the car. Further, once a stop has been made, there is no constitutional distinction between drivers and passengers: both present threats to officer safety and both must exit the car if instructed to do so. *Wilson*, 519 U.S. at 414-15.

Likewise, there is no constitutional difference between drivers and passengers in determining whether a seizure has occurred. *See Brendlin*, 127 S. Ct. at 2410 (passenger "was seized from the moment [the driver's] car came to a halt on the side of the road").

This reasonable exercise of police authority enables an officer, even absent particularized suspicion, to minimize risks to her safety by ordering the driver and passengers out of the car "pending completion of the stop." *Wilson*, 519 U.S. at 415.

Once a car's occupants have exited, police must have reasonable suspicion that a person is armed and dangerous in order to conduct a pat-down for weapons.[4] *See Terry*, 392 U.S. at 23-30; *Mimms*, 434 U.S. at 111-12 (once the driver exited the car, pat-down search was justified by the officer's observation of a bulge under the driver's coat); Opp. 7-8 (acknowledging that "[a]n officer" may "conduct a pat down if justified by reasonable safety concerns related to the stop").[5] Because the sole justification for a pat-down is to protect the police, not to investigate possible criminal activity, *see Terry*, 392 U.S. at 29,

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[4] During a traffic stop, it does not matter for purposes of the Fourth Amendment whether reasonable suspicion that a passenger is armed and dangerous is acquired before or after an officer orders the passenger out of the car. *Cf. Thornton v. United States*, 541 U.S. 615, 620-21 (2004) (validity of a search incident to custodial arrest does not depend on whether "the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he remained in the car"). In either case, the officer has both the power to order an occupant from the car pending completion of the stop, *see Wilson*, 519 U.S. at 415, and sufficient reason to conduct a protective search. *See Terry*, 392 U.S. at 1.

[5] *See also Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (police "may order out of a vehicle both the driver, and any passengers; [and] perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous"); *Long*, 463 U.S. at 1047-48 ("[P]olice may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous.").

as long as the pat-down follows a lawful seizure its validity is based upon reasonable suspicion that a person is armed and dangerous—not that criminal activity may be afoot.[6] *See id.*

Thus, under the Court's clear mandate, Officer Trevizo had the power to order respondent out of the car. And since she had an articulable basis to suspect that respondent was armed and dangerous, *see* Pet. Br. 4-7, she was further justified in conducting a limited search for weapons on his person.

B. Officer Trevizo Reasonably Exercised Her Discretion in Deciding When and How to Remove Respondent from the Car Pending Completion of the Traffic Stop.

Because of the risks inherent in traffic stops, police officers need discretion as to when and how to exercise their authority depending on the circumstances of the stop. For example, it was the practice of the officer in *Mimms* "to order all drivers out of their vehicles as a matter of course whenever they had been stopped for a traffic violation." 434 U.S. at 110. But "[k]eeping the driver of a vehicle in the car during a routine traffic stop is probably the typical police practice."[7] *New York v. Class*, 475 U.S. 106,

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[6] Accordingly, the question that the court of appeals declined to address—"whether officers, in the interests of their own safety, and based solely on the seizure resulting from the initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous," Pet. App. 16—is not only presented in this case but has been affirmatively answered by this Court.

[7] According to a survey by the Arizona Department of Public Safety, 96.1% of law enforcement agencies reported that violators remained in their cars while an officer was writing a ticket.

115 (1986). This does not mean, however, that if an officer does not immediately order a passenger out of the car when it is initially seized, the officer forfeits the right to protect herself. *See* Pet. App. 12-13.

Allowing police officers reasonable discretion to decide when and how to direct occupants from the car is vital because traffic stops often require quick decision-making in response to a wide range of circumstances. *See Terry*, 392 U.S. at 20 ("[W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat . . . ."). As this Court explained in *Atwater v. City of Lago Vista*, because the Fourth Amendment often applies "on the spur (and in the heat) of the moment . . . the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." 532 U.S. 318, 347 (2001). Particularly in situations involving the threat of violence, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving . . . ." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (describing standard in the context of exces-

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Arizona Dept. of Public Safety Research & Planning, *Police Practices Survey: Final Report* 1, 5 (Sept. 2003), *available at* http://www.dps.state.az.us/operations/policepractices.asp. *See also* International Assn. of Chiefs of Police & U.S. Dept. of Transp., National Highway Traffic Safety Admin., *Law Enforcement Stops & Safety Subcommittee: Staff Study* 25, 32-33 & tbl. A (2004), *available at* http://www.theiacp.org/div_sec_com/committees/LESS/LESSManualPrintQuality.pdf (surveying highway patrol practices).

sive force); *see also Thornton v. United States*, 541 U.S. 615, 621-22 (2004) (describing the "highly volatile situation" of a custodial arrest).

Furthermore, because traffic stops occur under a variety of conditions, police are trained to make tactical decisions based on road and weather conditions, lighting, neighborhoods known to be hostile to police, and traffic hazards posed by other motorists. *See* New York City Police Dept. Police Acad., *Recruit Training Section, Car Stop Lesson Plan* 3-5 (2006); District of Columbia Metro. Police Dept., *Unknown/High Risk Traffic Stops Lesson Plan* 4-6 (2007) (describing factors such as traffic congestion, visibility, and road design). Officers must make similar tactical decisions once they have identified the occupant of a car as a potential threat. To best ensure their safety, sometimes this may mean ordering all occupants out of the car immediately, and other times this may require singling out one passenger to exit the car once an officer suspects that the passenger is armed and dangerous. *Cf. Thornton*, 541 U.S. at 621; *compare* New York City Police Dept. Police Acad., *Advanced Level Training Unit, Felony/High Risk Car Stops* (2005) (when a stop is "known" to be high risk, police should utilize public address system in police car to give orders to car occupants), *with* N.Y.P.D. Police Acad., *Dangers of Car Stops*, at 5 (when the level of risk is "unknown," police should approach driver's side door with caution). Accordingly, police officers must be able to respond to perceived threats from passengers at any time until the stop has concluded—"lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater*, 532 U.S. at 347.

As noted above, police must not be constrained by legal rules based on unrealistic and technical jurisprudential distinctions that deny them the ability to protect themselves. *See Atwater*, 532 U.S. at 347. Yet the court below did precisely that by second-guessing when and how Officer Trevizo exercised her authority during the traffic stop. It concluded that because the police did not immediately order all occupants out of the car, and Officer Trevizo singled out respondent to ask him questions unrelated to the traffic stop, his seizure was converted into a separate and consensual encounter that precluded Officer Trevizo from patting him down. Pet. App. 12-16.

Not only is the court of appeals' decision contrary to the holding of *Wilson* that police may order a passenger from the car pending completion of the stop, it undercuts the basic premise of *Wilson*: that police officers must be able to exercise control over a traffic stop due to the risk of danger it presents to themselves and to others. An officer's reasonable suspicion that a passenger is armed and dangerous may arise well after the car is initially stopped; for example, after an officer approaches the car, looks inside, and assesses its occupants.[8] An officer who does not immediately order a car's occupants to exit, as the officer did in *Wilson*, should not be required to withdraw because she reasonably suspects that a passenger is a threat.

Moreover, this Court has held that an officer has discretion to make "reasonable inquiries" of a seized

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[8] After stopping a car, police may look inside, *see Coolidge v. New Hampshire*, 403 U.S. 443, 464 (1971), move around the car to gain better visual access, *Texas v. Brown*, 460 U.S. 730, 740 (1983), and use a flashlight to illuminate the car's interior. *Id.*

person, and "where nothing in the initial stages of an encounter serves to dispel his reasonable fear for his own or others' safety," the officer may pat that person down. *Terry*, 392 U.S. at 30. There is no basis for the conclusion of the court below that an officer relinquishes her authority to remove a person from a car and conduct a pat-down simply because the officer first engaged in a brief and cooperative conversation with that person.

Once Officer Trevizo suspected that respondent was an armed and dangerous gang member, she asked him for his name, date of birth, where he was from, and whether he had spent time in prison. Pet. App. 4. These basic questions fell well within the scope of an inquiry as to whether respondent was in fact an armed and dangerous gang member,[9] and when respondent's answers did not dispel Officer Trevizo's suspicions, she was justified in requesting that he exit the car for a pat-down.[10]

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[9] Gangs are a particularly pervasive problem in Tucson. *See* Josh Brodesky & Dale Quinn, *Gang Violence Spreads Across City*, Arizona Daily Star, Dec. 3, 2006. *See generally* Arizona Criminal Justice Commn., *2006 Gangs in Arizona* (2007), *available at* http://azcjc.gov/pubs/home/GangReport_091407.pdf. During the stop, Officer Trevizo suspected that respondent was a member of the Crips, a gang with a national reputation for violence. *See* Avis Thomas-Lester, *West Coast Gangs Are Making Inroads: Bloods, Crips Tied To Area Crimes*, Washington Post, August 29, 2008, at B1 ("The Crips and Bloods are the focus for law enforcement now, not only here but around the region, because of the violence they perpetrate." (quoting Captain Bill Lynn, commander of the Gang Unit of the Prince George's County (Md.) Police Department)).

[10] Contrary to the reasoning of the court of appeals, *see* Pet. App. 12-13, a police officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813 (1996). Because the

Indeed, an officer has discretion to ask questions beyond the scope of the stop's purpose. This Court recently held in *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005), that it was permissible for police conducting a search of a gang safe-house for weapons to question a detained occupant about her immigration status—an inquiry unrelated to the purpose of the search or detention. As the Court explained, so long as the questioning did not prolong the detention, the police did not need independent reasonable suspicion to conduct the inquiry. *See id.* at 101 ("We have held repeatedly that mere police questioning does not constitute a seizure.") (internal quotation marks omitted). The same reasoning applies here. *United States v. Mendez*, 476 F.3d 1077, 1080-81 (9th Cir. 2007) (Reinhardt, J.) (holding that the "reasoning [of *Muehler*] is equally applicable in the traffic stop context"); *cf. Illinois v. Caballes*, 543 U.S. 405 (2005) (dog sniff during a traffic stop for speeding was permissible as long as it did not extend the duration of the stop).

To be sure, at some point the seizure of passengers terminates. But this point will ordinarily be when the traffic stop ends—that is, when an officer returns a driver's license and registration and informs the driver that he is free to go. *See, e.g.*, *United States v. Farrior*, 2008 U.S. App. LEXIS 16575, No. 07-4498, at *13 (4th Cir. Aug. 5, 2008); *United States v. Ramirez*, 476 F.3d 1231, 1238-39 (11th

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record demonstrates that it was objectively reasonable to believe that respondent was an armed and dangerous gang member, any additional subjective beliefs—including her belief about her own authority over the situation, Pet. App. 5, 12, or any pretextual intentions—are irrelevant to the propriety of the search. *See Whren*, 517 U.S. at 813-18.

Cir.), *cert. denied*, 127 S. Ct. 2924 (2007); *United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996). As the Court explained in *Brendlin*, "a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing." 127 S. Ct. at 2407. Because "a passenger cannot assume, merely from the fact of a traffic stop, that the driver's conduct is the cause of the stop," *id.* at 2407 n.3, a passenger will not feel free to terminate the encounter. And even if the passenger were to know that "the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place." *Id.* at 2407.

Therefore, a conversation indicating that respondent was under police scrutiny while the stop was ongoing would not have communicated to a reasonable person that he was free to leave the scene. On the contrary, it would have been unreasonable for him to expect to "move around in ways that could jeopardize [her] safety." *Id.* Far from terminating the seizure by her questioning, Officer Trevizo validly exercised her discretion during the traffic stop.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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